DOCUMENT RESUME

ED 077 608 RC 007 026

AUTHOR	Ewald, Thomas R.
TITLE	Court Action for Migrants.
INSTITUTION	Migrant Legal Action Program, Inc., Washington, D.C.
SPONS AGENCY	Office of Economic Opportunity, Washington, D.C. Div. of Civil Rights.
PUB DATE	72
NOTE	145p.
AVAILABLE FROM	Migrant Legal Action Program Inc., 1820 Massachusetts Ave., N.W., Washington, D.C. 20036 ($5.00)
EDRS PRICE	MF-$0.65 HC-$6.58
DESCRIPTORS	*Civil Liberties; *Court Cases; Economic Factors; Grievance Procedures; Immigrants; Labor Camps; Labor Legislation; *Legal Problems; Low Income Groups; Migrant Problems; *Migrants; Minimum Wage Legislation; *Rural Areas

ABSTRACT

Aiding attorneys who represent migrant farmworkers and their families when affirmative civil action is required, this book helps to raise the level of migrants' legal protection to a minimum standard of adequacy. The text is based on the Federal Rules of Civil Procedure, a national set of rules. The book is divided into 3 sections: the identification and discussion of the 5 most important types of migrants' civil cases involving access to migrant labor camps, retaliatory firing and eviction, regulatory statutes, benefit programs, and contracts; the discussion of preliminary considerations in Federal civil suits on behalf of migrants; and the discussion of procedure in migrants' cases. Also included are 35 illustrative forms and 6 affidavits from an access case. (PS)

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COURT ACTION FOR MIGRANTS

by

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RC007026

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February 13, 1973

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by

Thomas R. Ewald

Migrant Legal Action Program, Inc.

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DEDICATION

Frank Cunning was in the middle of some work on this book on May 14, 1972, when he was killed in an automobile accident. Frank was a lawyer who helped poor people secure fundamental rights. This book is dedicated to his memory and to migrant farmworkers and their families, to whom he devoted his professional life.

INTRODUCTION

The court's opinion in *Gomez v. Florida State Employment Service*, 417 F.2d 569 (5 Cir. 1969), opens with these words:

> "Remarkable as it may seem in this litigation prone world, this is the premier case brought under a statute thirty-six years old. This case raises for the first time the question of whether under the Wagner-Peyser Act of 1933 and the regulations promulgated by the Secretary of Labor pursuant to that Act migratory farm workers who accept work through the employment system set up by the Act and regulations have rights and remedies for violations."

The reason for the absence of litigation to enforce the Wagner-Peyser Act is not hard to find. Migrants, the group intended to be protected by the Act and the regulations, had no lawyers to represent them in civil suits to vindicate their rights.

The neglected legal needs of migrant farmworkers and their families are not limited to the enforcement of regulatory statutes like the Wagner-Peyser Act. They extend to protection of migrants' fundamental constitutional, statutory, and common law rights, reform or repeal of legislation that discriminates against them, enactment of laws for their benefit, correction of administrative oversights to insure the effectiveness of laws and programs intended to assist and protect migrants, and action to identify and develop alternative employment opportunities and life styles.

This book is a practice manual for attorneys who represent migrant farmworkers and their families when affirmative civil action is required. Its purpose is to help raise the level of legal protection provided migrants to a minimum standard of adequacy.

The book relates mainly to the first category of legal services mentioned above--protecting migrants' fundamental constitutional, statutory and common law rights. It is about civil court practice. Thus, it is not a guide to a comprehensive program of legal services for migrants. Because it omits coverage of several varieties of court cases involving auto accidents, work-related injuries, divorces, criminal charges, etc., it is not even a guide to a complete program of litigation for migrants.

The text is based on the Federal Rules of Civil Procedure because they are a single set of rules that are in effect nationwide. The use of federal procedure in this book has required the inclusion of a chapter on federal jurisdiction. The reader should not take this emphasis on federal practice as an indication that federal court is always preferable to state court for migrants' cases.

The book is divided into three sections. The first identifies and discusses the five most important types of migrants' civil cases, involving access to migrant labor camps, retaliatory firing and eviction, regulatory statutes, benefit programs, and contracts. The second section discusses preliminary considerations in federal civil suits on behalf of migrants--evaluation of the case's strengths, the financial aspects of migrants' litigation, federal jurisdiction and venue, private remedies under the nineteenth century civil rights laws, and class action practice. The third section discusses procedure in migrants' cases, preparing and filing a complaint, serving summons and complaint, emergency relief, discovery, and summary judgment, and outlines the procedural history of an access case which was litigated successfully on behalf of migrants. The text is followed by 35 illustrative forms and six affidavits from the access case referred to in the last chapter.

Efforts have been made throughout to keep the book concise and compact.

ACKNOWLEDGEMENTS

This book grew out of a seminar on trial practice conducted by the Migrant Legal Action Program in the fall of 1971. It is the work of many people. Lawrence J. Sherman, Executive Director of the Migrant Legal Action Program, recognized the need for a practice manual for migrants' lawyers, helped start this project, contributed drafts of parts of the book, read the manuscript, and suggested improvements. The following persons contributed research, writing, and valuable suggestions: Kevin Carey, Vincent Carroll, Ed Clair, Frank Cunning, Terry Feiertag, Miriam Guido, Sarel Kandell, Amy Krieger, James Tanfield, and Jose Uranga. Margaret Suddath typed the manuscript in all its drafts and met an exacting schedule with work of the highest quality. Karen Feinstein edited the manuscript with the assistance of Alfred Chiplin, Pat Clarkson, and Dori Luz.

The drafts and galley proofs of this book were used as a training manual for lawyers and law students at two training conferences conducted by the Legal Services Training Program in the spring of 1972. The final edition incorporates many of the suggestions made by the persons who used the book at those sessions and in their own law practice thereafter.

Financial support for the writing and publication of this book was provided by the Office of Economic Opportunity. The views stated are those of the author and do not necessarily represent those of the Office of Economic Opportunity or any other agency of the United States Government.

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PART I

FIVE CIVIL CASES

CHAPTER 1

ACCESS TO MIGRANT LABOR CAMPS

I. Introduction

Migrants in the stream customarily live in labor camps on property owned by their employer or some other private person. The camps often are in isolated rural locations. Although a camp is the migrants' home while they live there, many camp owners and operators refuse to allow them to receive visitors in the camp, thereby intensifying the migrants' isolation and giving the camp the atmosphere of an outdoor prison.

A right of access—meaning a right for migrants to invite and receive visitors to their living quarters and the reciprocal right of visitors to enter migrant labor camps—is basic to migrant workers' and their families' enjoyment of fundamental constitutional rights, notably the First Amendment rights to exercise freedom of speech, to assemble peaceably, and to petition the government for a redress of grievances. A right of access, as defined above, is necessary to preserve the human dignity of persons who live in migrant labor camps and to insure that migrants are able to take advantage of government and private programs of assistance which have been established for their benefit.

The law of migrant labor camps should have the following objectives: (1) to establish for the occupants a right to live on the same level of human dignity as persons outside the camps, (2) to recognize a full right of access, and (3) to protect the occupants in their enjoyment of the right of access in the same manner and to the same extent as the law protects the owners and managers of the camps in the right to invite and receive visitors in their own homes. Since the labor camp access problem is unique to migrant farmworkers and since legal representation of migrants, litigation on their behalf, and public consciousness of their legal problems are recent developments, courts have been slow to recognize a right of access. They have had difficulty in finding a sound legal principle on which to base the right, and, on some occasions, when they have recognized the right, they have defined it narrowly.

Opinions have been published in six cases involving access to migrant labor camps, four of which are decisions on the merits, issued in 1971. The cases are as follows: *State v. Cameron,* 290 F. Supp. 36 (D. Ore. 1968); *People v. Rewald,* 318 N.Y. Supp. 2d 40 (1971); *Peper v. Cedarbrook Farms, Inc.,* 437 F.2d 1209 (3 Cir. 1971); *State v. Shack,* 277 A.2d 369, 58 N.J. 297 (1971); and *Folgueras v. Hassle* and *United States v. Hassle,* both reported at 331 F. Supp. 615 (W.D. Mich. 1971).

The *Cameron* and *Peper* cases involved procedural questions. In *Rewald* and *Shack*, the courts reversed convictions of camp visitors under state trespass laws, holding that the defendants had a right of access to the camps. In *Folgueras v. Hassle,* camp visitors and migrant camp occupants recovered damages and obtained declaratory relief against a camp owner who evicted the plaintiff visitors from the camp and prevented them from visiting the plaintiff occupants. In *United States v. Hassle,* the government sued the camp owner to vindicate the right of persons employed by government-supported migrant assistance programs and similar organizations to enter the defendant's migrant labor camps. The parties signed a consent decree providing a right of access in broad terms.

In the course of the foregoing cases, the courts considered four possible bases for finding a right of access to privately held camps. This chapter outlines the lines of reasoning employed, the remedies available in access cases, and the problems of obtaining full and effective relief. Other leading references on the right of access are Sherman & Levy, "Free Access to Migrant Labor Camps", 57 A.B.A.J. 434 (1971); Note, "Poverty Law, etc.–*State v. Shack,*" 46 N.Y.U.L. Rev. 834

(1971); and Spriggs, "Access of Visitors to Labor Camps on Privately Owned Property," 21 U. Fla. L. Rev. 295 (1969).

II. The Right of Access

The law of access has developed through criminal cases, where visitors have defended against prosecutions under state trespass laws, and civil suits, where private parties have taken affirmative action to obtain orders recognizing access rights. The private civil suits involve two closely related but distinct questions of state involvement: first, the question whether the activities of the private camp owner-operator involve the state or open up the camp to the public so as to create a right of access, and second, whether state action is present as required for a suit under 42 U.S.C. § 1983. The first question relates to the existence of a right of access and is discussed in this chapter. The second question, relating to the existence of a federal remedy and federal jurisdiction, is discussed in Chapter 9, Private Remedies under the Nineteenth Century Civil Rights Laws.

A. Legal Bases for a Right of Access

The courts have considered basing a right of access on the First and Fourteenth Amendments to the Constitution, the Supremacy Clause of the Constitution (Art. VI, Cl. 2), the state's landlord-tenant law, and new legal principles created specially for the purpose of settling access disputes.

First and Fourteenth Amendments to the Constitution. The reasoning that supports a right of access under the First and Fourteenth Amendments may be summarized as follows:

Freedom of speech and the right of people to assemble peaceably are protected against state government interference by the Privileges and Immunities Clause of the Fourteenth Amendment to the Constitution. *Hague v. C.I.O.*, 307 U.S. 496, 512-513 (1939). The constitutional protection covers the exercise of those rights in some locations but not in others.

Under the doctrine of *Hague* all persons have a constitutional right to enter streets, sidewalks, parks, and similar public places for the purpose of exercising free speech rights. On the other hand, the Bill of Rights protects the privacy of homes. As stated by Justice Douglas ". . . even when the police enter private precincts they must, with rare exceptions, come armed with a warrant issued by a magistrate. A private person has no standing to obtain even limited access. The principle that a man's home is his castle is basic to our system of jurisprudence." Concurring opinion, *Lombard v. Louisiana*, 373 U.S. 267, 274-275 (1963).

However, ownership of property does not confer on the owner absolute power to control the use of the property. In *Marsh v. Alabama*, 326 U.S. 501 (1946), the Supreme Court held that a town wholly owned by the Gulf Shipbuilding Corporation was publicly held for First Amendment purposes and that the owner was constitutionally prohibited from prosecuting persons who distributed religious literature on the streets.

In *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), the Court held that a privately owned shopping center, open to the public, was the "functional equivalent" of the business district of the company town in *Marsh*. In reversing an injunction against picketing a store in the shopping center, the Court noted that the "sole justification" offered for the owners' interference with the picketers' exercise of their First Amendment rights on shopping center premises was the owners' claimed absolute right under state law to prohibit any use of their property by others without their consent. "However," the Court said, "unlike a situation involving a person's home, no meaningful claim to protection of a right of [their

own] privacy can be advanced by respondents here. Nor on the facts of the case can any significant claim to protection of the normal business operation of the property be raised. Naked title is essentially all that is at issue." Opinion, at p. 324.

The First Amendment argument based on *Marsh v. Alabama* was made in all four migrant access cases decided in 1971. In *People v. Rewald*, 318 N.Y. Supp. 2d 40, the labor camp contained stores and other service facilities. The Court, following *Marsh*, found that the camp was a "typical company town" open to the public, and concluded that visitors (in this case a newspaper reporter) had a clear right of access. In *State v. Shack*, the New Jersey Court held that the migrant labor camp in question was not similar to the company town in *Marsh* and declined to extend the *Marsh* doctrine. Rather, it based a right of access on nonconstitutional grounds. *Folgueras v. Hassle* and *United States v. Hassle* involved camps consisting entirely of dwellings. Nevertheless, the Court found that the principle of *Marsh* was applicable and concluded that the migrants' isolation, poverty, and right to essential government benefits and charitable services outweighed the camp owner's property rights and made free access to the labor camps a necessity. In placing its decision on constitutional grounds, the Court also relied on a recent opinion by the Michigan Attorney General that "the owner or operator of a migrant agricultural labor camp by permitting occupation and movement of migrant agricultural workers and their families on the premises of the agricultural labor camp has thereby made the use of the agricultural labor camp premises, including ingress and egress therefrom, public," (*Folgueras v. Hassle*, 331 F. Supp. 615, 621 (W.D. Mich., 1971). On the facts of the case, the Court found that by permitting migrants to make all uses of the property associated with home ownership, the camp owner had made the camp public.

In the *Marsh* and *Logan Valley* cases, the Supreme Court created exceptions to owners' normal rights to restrict access to privately owned property for company towns and shopping centers. It reached those results by holding that the owners had opened the premises in question to the public and by balancing the interests of the parties involved. The decisions in *Shack* and the two *Hassle* cases suggest that, despite the fact that most migrant labor camps are not open to the general public, courts are prepared to recognize a right of access by creating a separate category for them in the law of free speech under the First and Fourteenth Amendments or (as discussed in the following section) in the law of landlord and tenant, or in both fields of law, using an analysis similar to the one used in *Marsh* and *Logan Valley* to balance the interests and personal rights of the parties involved.

In other cases not involving company towns, shopping centers, or migrant labor camps, courts have allowed access to private property only where there were present additional elements of federal regulation or state involvement. Under the National Labor Relations Act (from which farmworkers are excluded) the courts have held that, where effective communication can take place only on the private employer's premises, non-employee union organizers have a right of access to such property for the purpose of disseminating pro-union views and information. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *NLRB v. Stowe Spinning Co.*, 336 U.S. 226 (1949); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956); *NLRB v. S & H Grossingers, Inc.*, 372 F.2d 26 (2 Cir. 1967); *NLRB v. National Organization Masters, Mates, and Pilots*, 253 F .2d 66 (7 Cir. 1958); *NLRB v. Lake Superior Lumber Corp.*, 167 F .2d 147 (6 Cir. 1948). In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), the Court held that the private operators of a restaurant located on premises leased from the state violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution by excluding patrons from the premises because of their race.

In other cases it has been suggested, though not held, that members of the public should have a right of access to the premises of private businesses that operate under state licenses or receive government benefits and subsidies. *Lombard v. Louisiana*, 373 U.S. 267, 281-283 (1963) (concur-

ring opinion). Other approaches that might be taken by courts to establish a constitutional right of access to migrant labor camps are outlined in Spriggs, "Access of Visitors to Labor Camps on Privately Owned Property", 21 U. of Fla. L. Rev. 295 (1969). The opinion in *State v. Shack*, 277 A.2d 369, 373, *supra*, resting its decision on nonconstitutional grounds, cited the following sources for a "catalogue" of situations in which "necessity, private or public, may justify entry upon the lands of another": Prosser, *Torts* (3d ed 1964), § 24, pp. 127-129; 6A *American Law of Property* (A. J. Casner ed. 1954) § 28.10, p. 31; 52 Am. Jur., *Trespass*, § § 40-41, pp. 867-869; and *Restatement, Second, Torts* (1965) § § 197-211.

State law of landlord and tenant and newly created legal principles. From the standpoint of the law of real property in most states, the occupants' right to have visitors and the visitors' right to enter a farm labor camp depend on whether the occupants are regarded as tenants or licensees of the owner. Tenancy might be inferred from such circumstances as the workers' paying rent for camp housing or receiving lower wages in consideration for "free" housing. If the migrants are deemed to be tenants, a right of ingress and egress for themselves and their visitors generally exists. For example, tenant farmers were held to have a right to receive visitors of their own choosing in *Brown v. Kisner*, 6 So. 2d 611, 192 Miss. 746 (1942).

If the migrants are permittees or licensees of their employer because their housing is only incidental and in aid of their employment, then state law holds that the employer may restrict their right to receive visitors. Most of the state law cases on this point seem to involve domestic workers living in rooms in an employer's house. Thus it can be argued that the rule of law is premised on a respect for the employer's right of privacy in his own home or the employer's need for some particular personal service or constant presence at or near the work place.

The Supreme Court of New Jersey faced the property law question in *State v. Shack*, 277 A.2d 369, 374, but declined to decide whether migrants are tenants, seeing "no profit in trying to decide upon a conventional category and then forcing the present subject into it." Instead, the Court sought to make a "fair adjustment of the competing needs of the parties, in the light of the realities of the relationship between the migrant worker and the operator of the housing facility," and announced a set of general rules intended to reconcile the interests of the three parties. As an alternative theory, the Court in *Folgueras v. Hassle* and *United States v. Hassle*, 331 F. Supp. 615, 624-625, squarely held that under Michigan law migrants are tenants while they are in labor camps and that the grower may not interfere with their right to invite and associate with guests of their own choosing.

Supremacy Clause of the Constitution. The reasoning that supports a right of access under the Supremacy Clause (Art. VI, Cl. 2) of the Constitution is as follows:

Congress has established many programs for the assistance of migrant workers and their families, including Title III-B of the Economic Opportunity Act (42 U.S.C. § § 2861-2864), Head-start (Economic Opportunity Act of 1964, 42 U.S.C. § 2809), the Food Stamp Program (Food Stamp Act [new], 7 U.S.C. § 2011), the Migrant Health Program (Public Health Service Act, 42 U.S.C. 242 h), and the Migrant Education Program (Elementary and Secondary Education Act of 1965, 20 U.S.C. § 241 e (c)). The claim of eligible migrants to such benefits is a right. *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970); *Shapiro v. Thompson*, 394 U.S. 618, 627, n. 6 (1969). However, that right is illusory if there is not also implied a concomitant right on the part of those offering such benefits and services to make them available to the migrants. Where the facts show that these services cannot be provided to the migrants effectively without visiting them in labor camps, any rule of state law that would support camp owners in interfering with access to labor camps by persons engaged in assistance activities must fall before the Supremacy Clause.

In *Folgueras v. Hassle*, *United States v. Hassle*, and *State v. Shack*, *supra*, all of the persons denied access were representatives of federally funded migrant assistance programs or private chari-

table organizations that performed similar work. Both courts were strongly influenced by this circumstance and in part based a right of access on the overriding need to make the various benefit programs available to migrants; but neither court adopted the Supremacy Clause reasoning. The New Jersey Court in *Shack* decided the case on nonconstitutional grounds "because the interests of migrant workers are more expansively served in that way than they would be if they had no more freedom than these constitutional concepts could be found to mandate if indeed they apply at all." (*Supra*., at 372).

B. To whom does the right of access belong?

All of the migrant labor camp cases filed and decided to date have involved potential camp visitors. Of the decided cases, only *Folgueras v. Hassle* had camp occupants as parties. Thus, the interests of the visitors have tended to be emphasized and the interests of the occupants have tended to be neglected in the law, as indicated by the generic name of "right of access" by which these cases are commonly known. Under the circumstances, the courts may have considered relief adequate when it provided for the particular plaintiff visitor and the class of visitors he represents without giving as serious consideration to the relief that would have to be granted and the classes of visitors who would have to be accorded reciprocal rights of access in order to protect fully the rights of migrants to receive visitors, to have uncensored information, to enjoy the fundamental First Amendment freedoms, and to live in ordinary human dignity.

Thus, while the First and Fourteenth Amendments as applied in the *Hassle* cases would support access to camps by all visitors, the other legal theories would not. The Supremacy Clause of the Constitution, as argued in the access cases that have been decided, and the legal principle of the *Shack* case, as discussed by the Supreme Court of New Jersey in its opinion (*State v. Shack*, 277 A.2d at 374), would limit access to only those persons who offer the migrants benefits under government assistance programs and similar activities. Traditional local property law in most states would limit access to invited visitors.

III. Remedies

Where a right of access can be established, remedies for its denial are available in defense of state prosecutions for criminal trespass and by affirmative suits in state or federal court.

A. Defense to State Prosecution for Trespass

The first cases of denial of access to migrant labor camps arose out of prosecutions instigated by growers against camp visitors under state criminal trespass laws. In *People v. Rewald,* 318 N.Y. Supp. 2d 40, *supra,* and *State v. Shack,* 277 A.2d 369, *supra,* the courts held that the defendant visitor's right of access to the camp was a defense to the prosecution.

B. State Civil Remedy for Denial of Access

Under state law the existence of a right of access to a labor camp should give any person unreasonably denied access a cause of action for an injunction or damages. This action can be

premised upon the court's plenary jurisdiction or upon federal or state constitutional or statutory rights.

C. Federal Civil Remedy for Denial of Access

The usual basis for a federal claim for injunction, declaratory judgment, or damages due to denial of access to a migrant labor camp should be 42 U.S.C. § 1983. (See Chapter 9, Private Remedies under the Nineteenth Century Civil Rights Laws.)

Section 1983 requires evidence of state action. State action was clear in *Folgueras v. Hassle*, 331 F. Supp. 615, *supra*, where the plaintiff camp visitor was arrested by local police on the defendant camp owner's complaint. State action should be present for purposes of 42 U.S.C. § 1983 in most other cases where a right of access can be established. If police, called to the camp, help the visitor enter pursuant to this right of access, no case should result. On the other hand, if they arrest the visitor at the owner's instance or stand by while the owner evicts him or prevents him from entering the camp and meeting with the migrants, their behavior will supply sufficient "state action" to support a suit against the grower or the police or all of them under 42 U.S.C. § 1983. See Chapter 9, Private Remedies under the Nineteenth Century Civil Rights Laws, and *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961); *Downie v. Peters*, 193 F .2d 760 (10 Cir. 1951); *Lynch v. U.S.*, 189 F .2d 476, 479-480 (5 Cir. 1951); and *Catlette v. U. S.* 132 F.2d 902, 907 (4 Cir. 1943).

In addition to § 1983, the following statutes should support a federal court suit for denial of access under appropriate circumstances: If a conspiracy can be proved, 42 U.S.C. § 1985 (3) should be applicable. (See Chapter 9.) If the visitor represents an organization operating under a federal benefit statute, such as Title III-B of the Economic Opportunity Act, that Act may provide an implied private civil remedy against third parties' interference with the benefit program.

IV. Procedure in Cases of Denial of Access

A. Parties

The plaintiffs should include migrant occupants of the labor camp in question, as well as the visitors who were denied access to the camp and any potential future visitors to the camp.

B. Complaint and Legal Argument

In most cases the complaint should allege claims based on all four legal theories: (1) First and Fourteenth Amendments, (2) Supremacy Clause, where applicable, (3) local law of landlord and tenant, and (4) a principle created specially, as in *State v. Shack, supra,* to recognize a right of access to migrant labor camps. A form of complaint in an access case appears at the end of this book.

C. Proof

Where the camp resembles a company town and the owner-operator of the camp allows access selectively—for example, permitting vendors to enter but excluding Title III-B program outreach

workers, legal services personnel, and other "do-gooders"—the proof of those facts should lead the court to grant relief under the doctrine of *Marsh v. Alabama, supra*, as applied to migrant labor camps by the decision in *People v. Rewald, supra*. But where the camp is isolated and the owner-operator excludes most persons other than camp occupants, crew leaders, and the operator's own employees, plaintiff's counsel should plead and prove (1) that the camp is isolated and (2) that the owner-manager restricts access to it and otherwise interferes with the residents' freedom of occupancy.

V. Relief

The plaintiff in an access case may recover damages, a declaratory judgment, and an injunction.

A. Damages

In *Folgueras v. Hassle*, 331 F. Supp. 615, *supra*, the camp owner hit and kicked one of the plaintiff visitors and had him arrested and prosecuted for criminal trespass. (The trespass case was dismissed at the close of the prosecutor's evidence.) In the civil suit, the plaintiff visitors and migrants were awarded damages of $4500 against the owner. They settled their action against the arresting officers before trial for an undisclosed figure.

B. Injunction

An order enjoining the defendant from future interference with access to the camp probably should be issued in every case where the plaintiffs are successful in establishing a right of access.

Whatever the legal basis for the court's decision, plaintiff's counsel should try to avoid the adoption of a restrictive rule of relief, such as that indicated by the Supremacy Clause argument or by the rule suggested in the closing paragraphs of the *Shack* opinion. The broad, general language of the consent decree in *United States v. Hassle, supra*, 331 F. Supp. at 625-626, should be a satisfactory guide for the court's decree in most access cases.

Because of possible disputes between the owner-manager of the camp and the occupants and their visitors regarding specific details affecting access, the court may decide to add specific provisions to the decree. In doing so, the court should face the fact that there are no specific terms and conditions generally applicable for regulating the details of access to migrant labor camps. Any general set of conditions may be inappropriate to the particular camp, or may impinge on the occupants' and visitors' right of access there, or both.

All terms or conditions included in the court's decree should balance the respective personal rights and interests of the parties with regard to the particular camp and should be supported by the facts of the particular case. The following list suggests interests that the occupants, the potential visitors, and the owner-operator may have regarding a migrant labor camp which deserve to be taken into account in drafting the terms of a decree in an access case. (1) Occupants in the camps have a right to possession of the premises; a right of privacy; freedom of speech and a right to assemble

with others peaceably; a right to receive, invite, or exclude guests; a right to receive uncensored information; a right to engage in political activity and to petition the government; and a right to receive benefits under programs of assistance for which they are eligible. (2) Potential visitors have First Amendment rights, too. They have a right of access derived from the camp occupants' right to receive visitors. For some of them, this right is also derived from the camp occupants' right to receive the benefits and services of government programs and charitable activities. (3) The owner or operator has First Amendment rights and property rights. He has a right of privacy in his own home, often located far from the migrant labor camp. He has a right to protect the normal operation of his business (*Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 324) and to protect the property he owns against damage and destruction.

As few terms and conditions for access should be established as possible. It is not inevitable that long lists of terms and conditions favor the owner-operator at the expense of the other parties and that short lists balance the interests of all parties fairly. However, that is often the result, especially when, in preparing long, detailed lists of specific provisions, the parties and the court concentrate on balancing the interests of the visitors and the owner-manager and ignore the occupants of the camp whose interests include fundamental rights that should entitle them to first consideration in any balancing procedure. The court should test the provisions of its decree by comparing the extent to which those terms protect the migrants' right to live freely and without interference against the extent to which the local law enforcement officials protect the camp owner-manager's right to live freely and without interference in his own house outside the camp premises. Such a comparison will enable the court to evaluate the probable effectiveness of the decree in removing the unlawful restrictions and prison atmosphere from the camp.

CHAPTER 2

RETALIATORY FIRING AND EVICTION

I. Introduction

While migrants are in the stream they usually are dependent on growers, crew leaders and others for work, for housing at the work place, and for transportation from one job to the next. The conditions under which migrants work, live, and travel are difficult even when those on whom they depend carry out their agreements and obligations to provide minimum standards of pay, health, and housing. The failure of many growers, crew leaders, and contractors to keep their promises and to observe the laws is notorious. Further, it is common practice for employers and landlords to deal summarily with workers who complain by firing them from their jobs and evicting them from their housing in the labor camp.

The consequences of retaliatory firing or eviction can be devastating to migrants. They are usually put out of work for the rest of the season, often before they have earned enough to pay off last winter's debts. Workers who are fired by an employer for complaining about conditions or for organizing other workers to protest conditions often are blacklisted with other employers in the stream or with the local employment service. A single retaliatory firing and eviction can impair a migrant's earning capacity in that stream for a long time. A summary firing and eviction also causes a sense of powerlessness and a loss of dignity and self-respect.

Effective legal action to stop retaliatory firing and eviction is needed for several reasons. Retaliation is unlawful; migrants have constitutional and statutory rights to protest against conditions that violate laws enacted for their protection. The constant threat of retaliation inhibits migrants from asserting their rights and often causes them to submit to violations of the law. Action against retaliation is needed to demonstrate accountability to the law on the part of growers, landlords, crew leaders, and others who deal with migrants.

Cases to prevent retaliation against migrants are among the most difficult kinds of cases to handle, and probably for this reason there has been only one such case reported. (*Gomez v. Florida State Employment Service*, 417 F.2d 569 (5 Cir. 1969), discussed in Part III of this chapter). Some of the difficulties can be shown by contrasting the facts in a case of retaliation against a migrant with those in a case of urban retaliatory eviction like *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968). In the urban case, the landlord evicts an occupant of housing by legal process, which permits the occupant to defend against the eviction. The occupant stays in possession of the premises until the litigation is decided. However, in the case of the migrant, the landlord evicts the occupant summarily, either through self-help or with the aid of the local police, and without resort to legal process.

To resist the eviction, the migrant's lawyer must file an affirmative suit immediately. Because the migrant's employer is also his landlord, or shares closely related interests with the landlord, the migrant is fired at the same time as he is evicted. Thus, the pressures against resisting retaliation are enormous.

Counsel can effectively represent migrants in their area in retaliation cases only if (1) they keep close contact with the migrants so that any incidents or threats of retaliation will come to their attention immediately, and (2) they prepare in advance the procedures for investigating any retaliation case and take the necessary legal steps promptly.

This chapter sets out the legal basis for action to protect migrants against retaliation. First, it identifies the sources of the migrants' rights to be free from retaliation. Second, it outlines four causes of action to stop retaliation and secure damages for the more common instances of retalia-

tory eviction. Third, it outlines two approaches to defending a civil suit for eviction brought by the landlord. Fourth, it mentions seven other causes of action that may be available either to remedy retaliation or to obtain relief from the underlying causes of complaint that led to the retaliatory action.

II. Legal Basis for Migrants' Right to be Free from Retaliation

Migrants are protected against retaliation for exercising rights guaranteed by the Constitution, federal statutes, and state law.

A. Constitution

Under the First Amendment to the Constitution of the United States all persons have a right to exercise free speech, to assemble peaceably, and to petition the government for a redress of grievances. These rights have been held to include the rights to report violations of law, including housing laws, and to take part in tenants' organizations. *McQueen v. Druker*, 317 F. Supp. 1122, 1132 (D. Mass. 1970), *aff'd* 438 F.2d 781 (1 Cir. 1971); *Hosey v. Club Van Cortlandt*, 299 F. Supp. 501, 504 (S.D.N.Y. 1969). According to those cases, the constitutional protection covers complaints to state and local government officials, as well as to officials of the federal government. The persons making complaints are protected against threats of retaliation as well as actual retaliation.

Citizens also have a separate and additional right, under the Constitution, to report violations of federal law to federal officials. *In re Quarles & Butler*, 158 U.S. 532 (1895).

B. Federal Laws

Regulatory statutes. Migrants have a right to seek the protection provided by regulatory statutes, such as the Wagner-Peyser Act, 29 U.S.C. §§ 49 *et seq.*, and to report violations of the statutes, without risking retaliation. *Gomez v. Florida State Employment Service, supra; Edwards v. Habib, supra.*

Benefit statutes. As intended beneficiaries, migrants have a right to receive benefits under laws establishing programs of assistance, such as the Food Stamp Act, 7 U.S.C. § 2011 *et seq.*, and the Hill-Burton Act, 42 U.S.C. § 291 *et seq.*, and to report violations of the statute without retaliation. *Cook v. Ochsner Foundation Hospital, supra; Peoples v. United States Department of Agriculture*, 427 F.2d 561 (D.C. Cir. 1970).

Migrants and other persons are expressly protected against retaliation for reporting violations of certain statutes, such as the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3).

C. Rules of State Law

Within the past five years, an increasing number of jurisdictions have enacted statutes or adopted common law rules to protect occupants of housing from landlord retaliation for exercising various rights related to housing. Citations to the applicable laws and decided cases are as follows:

Cal.– *Schweiger v. Superior Court of Alameda County*, 476 P.2d 97, 90 Cal. Rptr. 729 (1970), *Aweeka v. Bonds*, 1 Civil 28025 (Cal. Ct. App., Sept. 28, 1971), 5 Clearinghouse Review 472; Pov. L. Rep., ¶ 2325.30, ¶ 2325.48, ¶ 2325.621;

Conn.–Conn. Gen. Stat. Ann. 52-540 (a);

D.C.– *Edwards v. Habib, supra;*

Ill.– Ill. Rev. Stat. Ch. 80, §71;

Md.– Laws of Maryland 1969, Ch. 223, Pov. L. Rep. ¶9727;

Mass.– Mass. Ann. Laws, Ch. 239,2A (1969), but see *McQueen v. Druker, supra;*

Mich.– *Riley v. Willette*, Pov L. Rep. ¶ 12,263 (Mich. Dist. Ct., 74th Dist., 1970) relying on MCLA § 600.5646(4)(a), *Dunn v. Hendershott*, Pov. L. Rep. ¶ 12,011 (Mich. Cir. Ct., County of Genessee, case # 16738), *Watts v. Lyles*, Pov. L. Rep. ¶ 9028 (Mich. Cir. Ct., Commissioners Ct., Wayne County, 1968);

Minn.–*Botko v. Cooper*, Pov. L. Rep. ¶ 11,549 (Minn. Mun. Ct., County of Hennepin, 1970);

N.J.– N. J. S. A. 2A:42-10.10 and 10.12, *Engler v. Capital Management Coop*, 271 A.2d 615, 617, 112 N.J. Super. 445 (1970);

N.Y.– *Hosey v. Club Van Cortlandt, supra, Club Van Cortlandt v. Hosey*, Pov. L. Rep. ¶ 11,644 (N.Y. Sup. Ct. App. Term, 1970), *Portnoy v. Hill*, 294 N.Y.S. 2d 278 (City Court of Binghamton, 1968), *703 Realty Corp. v. Greenbaum*, Pov. L. Rep. ¶ 10,854 (N.Y. Civil Ct. 1969), *Speziale v. Laranzano*, Pov. L. Rep. ¶ 10,095 (N.Y. Dist. Ct., Nassau County, 1969);

R.I.– G.L. § 34-20-10 and § 34-20-11;

Wis.– *Dickhut v. Norton*, 173 N.W. 2d 297, 45 Wis. 2d 389 (1970).

Most of the state statutes cited above relate to housing and protect tenants against retaliation by landlords. Under the common law of some of those states, migrant workers and their families may not be "tenants" while they are living in labor camps, if their occupancy is merely incidental to employment. However, the recent cases of *Folgueras v. Hassle*, 331 F. Supp. 615 (W.D. Mich. 1971), and *State v. Shack*, 277 A.2d 369, 58 N. J. 297 (1971), cast doubt on the validity of the defense argument that migrant workers and their families have no rights based on their occupancy of labor camp housing because their possession is only incidental to their employment (See Chapter 1, Access to Migrant Labor Camps). Moreover, constitutional precepts dictate that all types of retaliation should be actionable irrespective of whether there is any relationship between the plaintiff and the defendant such as an employment or housing relationship.

III. Remedies

When retaliatory action against a migrant is taken or threatened, counsel may file suit to stop the retaliation and to seek damages, file suit to remedy the underlying trouble that led to the

retaliation, or do both. If a civil suit for eviction is being filed by the landlord against the migrant in state court, the migrant can defend there and *may* be able to file suit in federal court to prevent the landlord from proceeding with the state court case.

A. Suits for Damages and to Stop Retaliation

The facts may support some or all of the following claims: (1) a suit for unlawful retaliation, (2) a suit for deprivation of civil rights under color of law, (3) a suit for breach of contract, and (4) a suit for tortious interference with the performance of a contract or with a prospective financial advantage.

Suit for unlawful retaliation. If a migrant's employer fires him or his landlord evicts him in reprisal for his having exercised a protected right, the migrant's most direct and legally pertinent action would be a suit for an injunction and damages for unlawful retaliation. This action, the affirmative counterpart to the tenant's defense of retaliatory eviction, requires the following findings and conclusions to be made by the court with respect to each case: (1) that the migrant asserted constitutional or statutorily protected rights, (2) that the statute or other protection carries with it an implied right to be free from retaliation, (3) that the defendant's dominant motive is retaliation, and (4) that there is explicit or implied authority for the migrant to file a civil suit to protect himself against retaliation. Affirmative suits for damages due to retaliation have been upheld in *Gomez v. Florida State Employment Service, supra,* and in *Aweeka v. Bonds, supra.*

The *Gomez* case held that migrant workers hired through the interstate recruiting system established under the Wagner-Peyser Act (29 U.S.C. § 49 *et seq.*) had an implied right to be free from retaliation for reporting violations of the housing regulations adopted pursuant to the Act and that migrant workers had a civil remedy implied in the regulations against a person who retaliates against them. In this case, workers were hired in Texas for farm jobs in Florida. When they arrived at the farm, according to the complaint, they found housing conditions that violated the housing regulations issued by the Secretary of Labor under the Wagner-Peyser Act. One of the workers reported the violations to a local board of health sanitarian who threatened the worker for making the report. Although the regulations did not expressly provide (1) that workers had a right to report violations, (2) protections against retaliation, or (3) a civil remedy against the person who committed the retaliation, the Court held that those rights were implied by the regulations. The Court accordingly held that the migrants had an implied civil cause of action as members of the class sought to be protected. Finding further that the civil cause of action was necessary to prevent retaliation, which would otherwise defeat the purpose of the regulations, the Court held that the migrant's complaint stated a claim under the remedy implied by the Wagner-Peyser Act regulations.

An affirmative cause of action for retaliatory eviction was also recognized under California law in *Aweeka v. Bonds, supra,* where the landlord doubled the tenant's rent because the tenant threatened to make necessary repairs and deduct the cost of the repairs from his rent in accordance with a statutory procedure.

Whether, as in the *Gomez* and *Aweeka* cases, a court will imply a civil cause of action in favor of private persons for breach of a statute or regulation whose terms do not explicitly provide a remedy depends on several circumstances. Often the language and history of the statute indicate an intention on the part of Congress or the legislature that an implied cause of action should be recognized. In some instances, it appears that the main purpose of the statute will be frustrated if an implied civil remedy is not available to members of the class intended to be benefited or protected by the statute. This argument is especially weighty where the federal or state legislation has created

new duties that have no counterpart in the common law or where state or administrative remedies are unavailable or are ineffective in practice. (See note, "Implying Civil Remedies from Federal Regulatory Statutes," 77 Harv. L. Rev. 285 (1963).)

A suit for unlawful retaliation can always be filed in state court. In addition, a federal court will have subject matter jurisdiction in any of the following circumstances: (1) under 28 U.S.C. § 1337, if the statute in which the civil remedy is implied is an Act of Congress regulating commerce. *Gomez v. Florida State Employment Service, supra*, 417 F .2d at 580-581; (2) under 28 U.S.C. 1331, if the case arises under the Constitution, laws or treaties of the United States and the matter in controversy exceeds $10,000, exclusive of interests and costs; (3) under 28 U.S.C. § 1332, if diversity of citizenship is present and the matter in controversy exceeds $10,000, exclusive of interest and costs; or (4) under 28 U.S.C. § 1343, if a civil rights act is violated. (See Chapter 8, Federal Jurisdiction and Venue in Migrants' Cases, and Chapter 9, Private Remedies under the Nineteenth Century Civil Rights Laws.)

The availability of an affirmative action for retaliation and the elements that should be alleged and proved in such an action will depend on state law. (See the state statutes and cases cited in Section II C above.) However, in most jurisdictions a complaint for retaliation should allege facts that show (1) the employment or housing relationship between the migrant and the defendant, (2) that the migrant engaged in protected activity, (3) that the defendant fired him, evicted him, or took some other action against him, or threatens to take such action, and (4) that the dominant motive for the defendant's action is retaliation against the migrant for engaging in the protected activity.

1. **The relationship between the migrant and the defendant.** Where the retaliation takes the form of an eviction, the migrant should allege and prove that he originally came onto the premises with the consent of the landlord and not as a trespasser. His exact status as a tenant, permittee, or licensee should not affect his right to protection against a retaliatory eviction. See *Hosey v. Club Van Cortlandt, supra,* where a tenant from week to week was protected against a retaliatory eviction. Similarly, where the retaliation takes the form of a firing, the migrant should allege and prove the employment relationship between himself and the defendant, even though the employment was at will and he was subject to discharge at any time for reasons other than retaliation.

2. **The migrant engaged in protected activity.** A wide variety of activities are impliedly protected against retaliation by the Constitution or by statutes. Such activities include organizing and meeting with other tenants or employees and making direct requests to the landlord to correct violations. (See *Hosey v. Club Van Cortlandt, supra; Alexander Hamilton Savings and Loan Association of Paterson, N. J. v. Whaley*, Pov. L. Rep. ¶ 10,430 (N.J. Dist. Ct., Hudson County 1969); and *Schweiger v. Superior Court of Alameda Co., supra.*) Where complaints are involved, they may cover housing or health conditions, pesticide hazards, or any other conditions regulated by law. The complaint need not have been communicated to government officials. See *Hosey v. Club Van Cortlandt, supra.*

3. **The defendant has taken action against the migrant.** Under the policy against retaliation, any form of retaliation that interferes with the purpose of the applicable constitutional provisions or laws under which the migrant was exercising rights is unlawful. In addition to the cases which make it unlawful for the landlord to evict occupants, raise rent, cut off utilities, or otherwise harass tenants in ways that involve housing, there are cases under state labor statutes holding that an employer may not terminate an employment at will in reprisal because his employees have joined a labor union. See *Glenn v. Clearman's Golden Cock Inn, Inc.*, 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (1961); *Sand v. Queen City Packing Co.*, 108 N.W. 2d 448 (N.D. 1961); *Cooper v. Nutley Sun Printing Co.*, 36 N.J. 189, 175 A.2d 639 (1961); *Independent D.W. Union v. Milk D&D Emp.*, 30 N.J. 173, 139 A.2d 134, 137 (1958); *Krystad v. Lau*, 400 P.2d 72 (Wash. 1965).

4. The dominant motive for the defendant's action is retaliation for engaging in the protected activity. In some states the migrant might be required to prove that retaliation was the *only* reason for the eviction. (See the Connecticut statute, Conn. Gen. Ses. Ann. § 52-540(a).) However, in *McQueen v. Druker, supra,* 317 F. Supp. at 1125-1127, where the landlord gave five reasons for the eviction (none of them involving retaliation), the Court found there was a basis in fact for each of the five reasons but held the landlord liable on a finding that the "chief" or "controlling" reason was retaliation.

As a practical matter, proof that the defendant actually knew of the plaintiff's activity probably will be necessary in every case in order to prove that the defendant had a retaliatory motive. However, the defendant's knowledge often can be proved by circumstantial evidence.

5. Other elements. The case law or court practice in various states might require other facts to support a claim for unlawful retaliation. For example, in a Florida retaliatory eviction case, *Wilkins v. Tebbets,* 216 So.2d 477 (Fla. App. 1968), *cert. denied,* 222 So.2d 753 (Fla. 1969), the Court required a tenant seeking to establish a defense of retaliation to plead and prove the language of the city ordinance he claimed was violated and that the landlord had in fact committed a violation of the ordinance. (The state court did not take judicial notice of city ordinances.) Thus, the Florida court would protect persons who report violations of the law only if they can prove the violations in court.

6. Relief. Where the facts support, the migrant may obtain an injunction and compensatory and punitive damages. *Aweeka v. Bonds, supra; Gomez v. Florida State Employment Service, supra.*

Suit for deprivation of civil rights under color of law. If retaliation of the sort described in the preceding section occurs with the aid of state or local officials, the plaintiff migrant may have a claim under the Civil Rights Act, 42 U.S.C. § 1983. The various situations where state action or action under color of law may be present are outlined in Chapter 9, Private Remedies under the Nineteenth Century Civil Rights Laws. When a grower's efforts to evict migrants are assisted by local police or the county sheriff, as is often the case, state action is present for purposes of 42 U.S.C. § 1983. Federal courts have subject matter jurisdiction of cases under 42 U.S.C. § 1983 by virtue of 28 U.S.C. § 1343 (3), (4).

Suit for breach of contract. The most common contractural arrangements between migrants and employers are outlined in Chapter 5, Contract Cases. In any of those situations, a migrant fired or evicted because of a dispute over living and working conditions may have a separate action for breach of contract in addition to an action for retaliation. Counsel for the migrant should investigate the facts promptly and thoroughly to see whether the defendant failed to pay at the agreed rate, made unauthorized deductions from the migrant's pay, or otherwise failed to live up to his agreement with the migrant.

State law determines the material factual elements of a claim for breach of contract and the type of relief that is available. In most cases a complaint should allege facts showing (1) the existence and terms of the agreement, (2) the plaintiff's performance of his obligations (or his readiness to perform) or his reliance on the defendant's promises, (3) breach by the defendant, and (4) a right to relief.

Damages may be the only relief available for breach of some of the terms of the agreement between the defendant and the migrant. Many courts refuse to order an employer to reinstate a wrongfully discharged employee or otherwise to order specific performance of an employment contract. Nevertheless, punitive damages may be recoverable if the facts show a deliberate, willful, or inexcusable breach of contract. *McCormick* cites, by way of example, "an abrupt and oppressive dismissal of an employee without cause and before the expiration of his term of employment." See *McCormick on Damages* (1935) pp. 290-291, citing *Addis v. Gramophone Co., Ltd.* (1909) A.C. 488, 3 British Ruling Cases 98, and see *Holland v. Spartanburg Herald-Journal Co.*, 165 S.E. 203 (S.C. 1932), 84 ALR 1336 (exemplary damages disallowed).

Suit for tortious interference with the performance of a contract or with a prospective financial advantage. Where one person without justification causes another person to fire, evict, or otherwise retaliate against a migrant in a way that interrupts the performance of the migrant's contract or deprives him of a prospective financial advantage, the migrant has an action against the person responsible. He may seek an injunction or compensatory or punitive damages. This cause of action, which is outlined in Chapter 5, Contract Cases, may be available in fewer cases than others, but it should not be overlooked.

B. Defense Against Retaliatory Suit for Eviction

As mentioned above, migrants are more likely to be evicted summarily than through court action. In some states, where migrants in labor camps are regarded as permittees or licensees, state law expressly authorizes landlords to evict them without resort to legal process. See Annotation, "Right of Landlord Legally Entitled to Possession to Dispossess Tenant Without Legal Process," 6 ALR 3rd 177 (1966).

If, however, a landlord should retaliate by suing in state court for possession of the premises the migrant is occupying, the migrant can defend in state court on grounds of retaliation. If such a lawsuit is threatened, the migrant also may be able to file an affirmative suit in federal court under 42 U.S.C. § 1983 to prevent the landlord from proceeding with the eviction case in state court.

Defense in state court. The doctrine of retaliatory eviction, as established by *Edwards v. Habib, supra,* and the cases following it, allows housing occupants to defend against eviction actions brought by landlords in reprisal for the occupants' exercise of protected rights. (See Section II C). To establish the affirmative defense of retaliation, in most cases the defendant tenant should show (1) that he engaged in an activity that is protected by a statute, regulation, or other rule of law, (2) that the statute or rule implies a right to be free from retaliation for that activity, and (3) that the landlord's dominant motive for commencing the eviction is retaliation for that activity. Thus, if a migrant is being sued for eviction for complaining about health and housing conditions that violate applicable state or federal regulations, the protection against a retaliatory eviction should be that implied by the regulations. Similarly, if he is being sued for eviction for complaining about deductions taken by the crew leader from his pay, the appropriate claim may be that the Farm Labor Contractor Registration Act implies a right against retaliatory eviction.

As mentioned in the discussion of the affirmative suit for retaliation (Section III A), the occupant's status as tenant, licensee or permittee does not affect his right to be protected against retaliation.

Affirmative suit in federal court to prevent eviction by state court. A retaliatory eviction proceeding in state court, which deprives a housing occupant of federally protected rights, violates 42 U.S.C. § 1983. (See Section III A of this chapter.) If a landlord has threatened to evict a migrant in reprisal because the migrant engaged in federally protected activities, and if it is clear that the state court will not allow the migrant to defend on grounds of retaliation, then a federal court will enjoin the landlord from carrying out his threat to file suit for eviction. *McQueen v. Druker, supra.*

The migrant's complaint in federal court should allege the following:

1. Federal jurisdiction under 28 U.S.C. § 1343 (3)(4).
2. The plaintiff migrant is occupying the premises lawfully.
3. The migrant has engaged in activity that is protected against retaliation by the Constitution or by federal law.
4. The motive for the defendant's threatened action is retaliation against the migrant for engaging in the protected activity.

5. The state court will not permit the migrant to defend the eviction suit on grounds of retaliation.

The prayer for relief should request an injunction against the landlord's evicting the migrant by filing suit in state court or otherwise.

However, if the landlord's eviction suit is filed in state court before the migrant's suit under § 1983 is filed in federal court, the federal court may decide that the case is barred by the Federal Anti-Injunction Statute, 28 U.S.C. § 2283. See *McQueen v. Druker, supra.* Moreover, if the state court allows the defendant migrant to defend the eviction on grounds of retaliation, the federal court may refuse to consider the case until the state court proceedings are concluded. *Hosey v. Club Van Cortlandt, supra.*

C. Other Remedies against Retaliation

Other civil remedies which may be applicable to cases of retaliation against migrants are provided by statute.

Under the Fair Labor Standards Act, 29 U.S.C. § 215 (a)(3), 217, the Secretary of Labor may bring an action to restrain persons from retaliating against employees for starting or taking part in proceedings to recover minimum wages.

The Civil Rights Act of 1866, 42 U.S.C. §§ 1981 and 1982, creates a private right of action for racial discrimination in employment or in housing. Federal courts have jurisdiction of such suits by virtue of 28 U.S.C. § 1343 (4).

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000 e, prohibits discrimination in employment because of race, color, religion, sex, or national origin. The administrative remedy involves a written charge to the Equal Employment Opportunity Commission. The Act also provides in § 2000e-3(a) that retaliation against an employee who has made a charge or otherwise participated in an E.E.O.C. proceeding is an unlawful employment practice. See *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998 (5 Cir. 1969).

Under 42 U.S.C. § 1985 (3), any person injured by a conspiracy to deprive him of equal protection of the laws or equal privileges and immunities under the laws has an action for damages against any one or more of the conspirators. The plaintiff must allege and prove the conspiracy; a "racial, or perhaps otherwise class-based, invidiously discriminatory" motive on the part of the conspirators; an act in furtherance of the object of the conspiracy; and resulting injury. State action is not required. *Griffin v. Breckenridge*, 403 U.S. 88 (1971). Federal courts have jurisdiction of suits filed under 42 U.S.C. § 1985 by virtue of 28 U.S.C. § 1343 (1). (See Chapter 9, Private Remedies Under the Nineteenth Century Civil Rights Laws).

D. Remedies for the Underlying Trouble

In addition to acting to stop the retaliation, counsel for the migrants should consider pursuing remedies for the underlying conditions that led to the retaliation, including the following:

1. A suit to enforce the migrant's rights under a regulatory statute, where a private action is expressly provided by the statute (*e.g.*, Fair Labor Standards Act, 29 U.S.C. § 216b; see Sherman, "Farmworkers Amendments to the Fair Labor Standards Act," 5 Clearinghouse Review, August-September 1971, p. 207) or where a private right of action is implied by the law.
2. An action to compel the responsible officials to enforce a regulatory statute, such as a health and housing code for labor camps. *Gomez v. Florida State Employment Service, supra.*
3. An action to compel administrators to provide benefits according to a statutory program of assistance. *Cook v. Ochsner Foundation Hospital, supra.*

CHAPTER 3

CASES BASED ON REGULATORY STATUTES

I. Introduction

Federal and state statutes have been adopted which seek to confer benefits on migrants and other farmworkers. Laws also have been passed to regulate generally or specifically the conduct of growers, crew leaders, and others with whom migrants are involved in order to prevent exploitation and to provide migrants with minimum standards of living and working conditions. Each of these statutes provides some enforcement system in an effort to insure that the migrants actually receive the contemplated statutory benefit or protection. However, in practice most of the statutory enforcement systems are ineffective for one or more of the following reasons:

1. The absence of effective sanctions in the law.
2. Inadequate budget and appropriation for the government agency that has enforcement authority.
3. Failure of the agency to assign a sufficiently large, adequately trained staff to enforcement activities.
4. Restrictive interpretations of the law by the agency's staff.
5. Lack of vigorous enforcement policies on the part of the agency and its staff.

Usually the statutes are enforced most effectively when the laws provide a private remedy on behalf of the migrants, expressly or by implication, and the migrants have good legal representation.

This chapter outlines six federal regulatory statutes that provide protections for migrant workers and their families and discusses the availability of private remedies under each statute. Chapter 4, Cases Arising out of Benefit Programs, discusses the parallel subject of private remedies for migrants who are deprived of benefits under statutory programs of assistance. The six regulatory statutes are as follows:

Wagner-Peyser Act, 29 U.S.C. § 49
Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*
Sugar Act of 1948, 7 U.S.C. § 1100, *et seq.*
Farm Labor Contractors Registration Act of 1963, 7 U.S.C. §§ 2041-2053
Interstate Commerce Act (Transportation Regulations), 49 C.F.R. § 398.1 *et seq.*
Immigration and Naturalization Act of 1952, 8 U.S.C. § 1101 *et seq.*

These statutes are intended to protect migrants with respect to wage rates and the terms and conditions of employment, housing and health conditions, transportation, and job competition. In some home base and stream states, state laws have been passed to regulate minimum wages, child labor, farm labor contracting, health and housing conditions in farm labor camps, health and sanitary conditions in fields, transportation of farmworkers, and the use of pesticides and herbicides. It is conceivable that in a given situation the applicable state law or regulation may provide migrants with more effective protection than any of the federal regulatory statutes. State regulatory laws are not covered in this chapter, however, because of the complexity of that undertaking and because the principles discussed here in connection with federal statutes should be applicable to practice under the comparable state laws.

Cases based on regulatory statutes customarily involve three interests or three "actors": the migrants, the violator, and the enforcement agency named by the statute. In those instances when a private remedy is available, the migrants may become enforcers so that resort to the enforcement agency is unnecessary. On other occasions, as *Gomez v. Florida State Employment Service*, 417

F.2d 569 (5 Cir. 1969), aptly illustrates, the statutory enforcement agency may be one of the violators and subject to suit by the migrants. In any case, counsel may find this three-party analysis useful in identifying claims arising under regulatory laws and devising strategies to insure migrants' receipt of statutory protections.

II. Wagner-Peyser Act

A. General

The 1933 version of the Act, 29 U.S.C. § 49, establishes the United States Employment Service (now the United States Training and Employment Service) in the Department of Labor to promote and develop a national system of employment offices for the purpose, among others, of maintaining a farm placement service (§ 49b). The state employment services (§ 49c) are operated by the various state governments on federal funds and under the supervision of the Department of Labor. The interstate recruitment system operated through the state employment services is described in the court's opinion in *Gomez v. Florida State Employment Service, supra,* and in an opinion of the Attorney General of the United States referred to in the *Gomez* case, Migrant Farm Labor–Wagner-Peyser Act, 41 Op. A.G. 406, 407 (July 2, 1959). (The benefit program aspects of the Wagner-Peyser Act are discussed in Chapter 4.)

Under his rule-making power, the Secretary of Labor has issued regulations on agricultural placement services (20 C.F.R. § 602.8), interstate recruitment of farmworkers (20 C.F.R. § 602.9), certification and use of temporary foreign labor for agricultural and logging employment (20 C.F.R. § 601.10), and housing for agricultural workers (20 C.F.R. § 620). Although the *Gomez* case mainly involved the housing regulations, all of the other regulations in 20 C.F.R. § 602 are relevant to migrants' problems. Moreover, the terms of the Act itself may protect against other abuses, such as over-recruitment.

B. Statutory Protections

The regulations provide express protection for farmworkers in the operation of the interstate recruitment system.

For the protection of farmworkers within a given state, the state agency is prohibited from placing orders for farmworkers through the interstate system unless it finds that agricultural workers are not available within the state. (20 C.F.R. § 602.9a).

To protect migrant workers, the regulations provide that the state agency shall not place orders in interstate clearance unless the following conditions are met:

1. The state agency has established that workers are needed (20 C.F.R. § 602.9b).
2. It has ascertained that the wages offered are not less than the prevailing wages in the area for similarly employed domestic agricultural workers (20 C.F.R. § 602.9c).
3. It has ascertained that housing facilities are available which meet certain minimum standards (20 C.F.R. §§ 602.9d, 620).
4. It has ascertained that the employer has offered the workers transportation that meets certain minimum standards (20 C.F.R. § 602.9e).
5. It has ascertained that the other terms and conditions of employment that are offered are

not less favorable than those prevailing in the area for domestic agricultural workers (20 C.F.R. § 602.9f).

The regulations also provide a certification system that is intended to protect domestic workers against competition from temporary foreign workers.

C. Remedies for Violation and Non-Enforcement

The Act (29 U.S.C. § 49h) provides a fund cut-off procedure in the event a state employment service violates the Department of Labor's rules and regulations under the Act.

Where employers fail to comply with the housing, minimum wage, and other regulations or any other applicable federal or state laws, the state employment service is to refuse to extend interstate recruitment services to them.

If workers are recruited and hired through the interstate recruitment system in violation of the regulations, the workers have a cause of action for an injunction and damages against the officials of the employment service who have failed to carry out the procedures provided by the statute and against the employer who has intentionally misled the state employment service officials by placing the order while he was out of compliance with the regulations. *Gomez v. Florida State Employment Service, supra.* This cause of action has two bases: (1) an implied remedy from the Wagner-Peyser Act and its regulations (*Gomez v. Florida State Employment Service, supra,* 417 F.2d at 575-577); and (2) a 42 U.S.C. § 1983 claim (*Gomez,* at 578-579). Federal jurisdiction for the implied remedy under the Wagner-Peyser Act, an act to regulate commerce, is based on 28 U.S.C. § 1337; for the § 1983 claim, on 28 U.S.C. § 1343.

Workers also may have an implied remedy under the Wagner-Peyser Act for minimum wages provided by the Fair Labor Standards Act and for damages due to breach of contract, as claimed by the plaintiffs in *Flores v. Taylor Farms,* Civil Action No. 1261, U.S. Dist. Ct., W.D. Mich. (A consent order has been entered in the *Flores* case after a settlement of the plaintiffs' wage claim.)

D. The Wagner-Peyser Act in Future Cases

The *Gomez* opinion, 417 F.2d at 575-578, strongly indicates that the implied civil remedy is not limited to violations of the housing regulations (20 C.F.R. § 620) but extends to all violations of the Act and any of the regulations under it. Thus, in any case involving a violation of the statute or the regulations, the implied remedy should be available to accomplish any of the following objectives:

1. To obtain compliance with the Act and the regulations;
2. To obtain an injunction and damages in suits against employers and against officials of state employment services responsible for violations; or
3. To obtain federal jurisdiction in cases that otherwise involve nonfederal claims, such as claims for wages.

Stringent enforcement of the Wagner-Peyser Act by private plaintiffs nevertheless can have its costs or can produce unintended effects, making it necessary for migrants' counsel to keep the main objectives of the litigation clearly in mind when planning a case based on this statute. As one of the results of the decision in *Gomez* and other cases based on it, many employers abandoned use of the interstate system in favor of other unregulated methods of recruiting farmworkers. Similarly, on occasion, efforts to enforce the housing code (20 C.F.R. § 620) have caused individual growers

to close labor camps or to switch to crops that can be harvested mechanically, thereby reducing the supply of housing and jobs available to migrants.

III. Fair Labor Standards Act

A. General

The Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, when passed in 1938, provided a minimum wage rate for most employees but expressly excluded farmworkers. In 1966 the Act was amended to extend the minimum wage provisions to most agricultural workers. The basic reference work on the FLSA as it affects farmworkers is Sherman, "Farmworkers Amendments to the Fair Labor Standards Act: A Guide to Minimum Wage Practice and Procedure," 5 Clearinghouse Review 207 (August-September 1971).

B. Statutory Protections

The FLSA seeks to protect the farmworkers' right to a minimum wage rate by imposing on employers a duty to pay minimum wages, 29 U.S.C. § 206(a), and a duty to keep certain pay records under 29 U.S.C. § 211(c) and 29 C.F.R. § 516.1-.2. The Act has overtime pay provisions, but agricultural workers are exempt from them. 29 U.S.C. § 213(b)(12).

The Act also seeks to protect against "oppressive child labor" and to protect adult workers against competition in the job market from underage workers. 29 U.S.C. §§ 213(c)(1) and 214.

The statute prohibits retaliation in any form against any employee for exercising rights under the FLSA. 29 U.S.C. § 215(a)(3).

Employers are generally covered by the provisions of the FLSA if they used 500 man-days of agricultural labor (as defined by §§ 203(e), (u) of the Act) during any quarter of the preceding calendar year. 29 U.S.C. § 213(a)(6)(A). (Section 213(a) *et seq.* specifies other employee exemptions, the most important of which is § 213(a)(6)(C) excluding commuting pieceworkers from coverage.)

C. Remedies for Violations

The Act provides four methods of enforcement: employee suits to recover wages due, suits by the Secretary of Labor to enforce the Act, criminal proceedings instituted by the Attorney General, and suits for relief from retaliation.

Where an employer covered by the Act fails to pay workers wages at the minimum rate, the workers have a civil action against the employer for the amount of the unpaid wages due, a reasonable attorney's fee and costs, and possibly liquidated damages. 29 U.S.C. § 216(b).

On written complaint by an employee, the Secretary of Labor may file suit to recover the amount of unpaid wages due. 29 U.S.C. § 216(c).

Criminal penalties are provided by 29 U.S.C. § 216(a) for violations of the minimum wage provisions of §§ 206 and 207 as incorporated in § 215.

The Secretary of Labor may file suit for an injunction against an employer who has retaliated against an employee for exercising FLSA rights. 29 U.S.C. § 217. In that action, the Secretary also

may secure the employee's reinstatement and back pay. *Mitchell v. De Mario Jewelry, Inc.*, 361 U.S. 288 (1959). One who retaliates against an employee also is subject to prosecution under 29 U.S.C. § 216(a).

It is generally held that an employee who has been subjected to reprisals does not have a private remedy. Nevertheless, in the only farmworker case on the subject, *Smith v. Jason Morris Farms, Inc.*, No. 811 (4 Clearinghouse Rev. 617, April 1971), the United States District Court for the Eastern District of North Carolina, on suit by workers who had been discharged for exercising rights under the FLSA, ordered a blueberry grower to hire all future pickers without regard to their previous activities to secure the minimum wage. A show cause order instituting contempt proceedings under that order later issued; the case is still pending on retaliation and other issues.

The Secretary of Labor may file suits for injunction to enforce the child labor provisions of the Act. 29 U.S.C. § 212(b).

D. The FLSA in Future Cases

The Fair Labor Standards Act's farmworker provisions are extremely complicated, and there is no doubt that most farmworkers are unaware of the Act's potential applicability to their employment situation. Yet the Department of Labor enforces the farmworker provisions of the Act only in response to complaints, and then grudgingly so, because of the great amount of resources needed to prosecute a farmworker case successfully.

Despite these circumstances, counsel can use the FLSA on behalf of migrants to accomplish the following objectives:

1. To recover unpaid wages due under the Act's minimum wage provisions (an important collateral effect being replacement of the varying piece rate with a statutorily guaranteed minimum);
2. To provide federal jurisdiction in cases that otherwise involve only nonfederal claims, such as contract claims; and
3. To reduce job competition by underage workers by obtaining enforcement of the child labor provisions.

IV. Sugar Act of 1948

A. General

The Sugar Act, 7 U.S.C. § 1100 *et seq.*, provides for money payments by the Secretary of Agriculture to sugar producers. Sections of the Act make these payments conditional on the producers' paying minimum wages set by the Secretary (7 U.S.C. § 1131(c)) and avoiding use of child labor (7 U.S.C. § 1131(a)).

The Secretary of Agriculture annually issues regulations setting minimum wage rates under the Act. See 7 C.F.R. § 802 specifying the procedures employed. The current minimum wage rates for sugar workers can be found in the following regulations: 7 C.F.R. § 862 (sugar beets), 7 C.F.R. § 863 (Florida sugar cane), and 7 C.F.R. § 864 (Louisiana sugar cane). While the regulations issue annually, they are fairly uniform from year to year, except that the hourly wage rate has recently gone up about 10¢ a year.

B. Statutory Protections

The Child Labor Section (7 U.S.C. § 1131 (a)) provides that, if children under 14 years of age have worked on the farm, the producer's payment will be reduced by $10 per child for each day worked.

The Minimum Wage Section (7 U.S.C. § 1131(c)(1)) seeks to protect the workers' right to receive wages at minimum rates set by the Secretary of Agriculture as fair and reasonable after investigation, notice, and an opportunity for hearing by requiring (1) payment of minimum wages and (2) record keeping. Note, however, that unlike the FLSA, the lower piece rate can in most instances take precedence over the higher minimum wage.

Recent court cases have held that the producer must pay all wages directly to the worker. In *Salazar v. Hardin*, 314 F. Supp. 1257 (D. Colo. 1970), a regulation issued by the Department of Agriculture allowing producers to make workers' payments to their crew leaders was held invalid. In *Rodriguez v. Zimbelman*, 317 F. Supp. 921 (D. Colo. 1970), the Court held that the Act and 7 C.F.R. § 862.13 prohibited the producer from deducting from workers' wages the amounts claimed by third party creditors because that practice denies the workers the opportunity to contest the creditors' claims. Both rulings were adopted by the Department in recently issued regulations, which are likely to remain in effect.

In a 1971 decision in *Angel v. Hardin*, No. C-2784 (National Clearinghouse No. 4766), a suit by farmworkers arising out of the Secretary's wage rate hearings, the United States District Court at Denver, Colorado, held that the Secretary of Agriculture has the authority under the Act to issue regulations establishing a housing code and other minimum standards of employment, as well as minimum wage rates, and to condition payment of the producers' Sugar Act allotments on their compliance with those regulations. The Court also held that if such regulations are proposed, the Secretary has a duty to consider them during the wage rate proceedings. The decision recognized a right of farmworkers and their representatives to participate fully in the annual hearings.

C. Remedies for Violations

It is provided under 7 U.S.C. § 1131(a) that the prohibition against child labor be enforced by the penalty deductions previously referred to.

Under 7 U.S.C. § 1131 the minimum wage provision is to be enforced by the Department of Agriculture's withholding the producer's allotment payments or deducting the amount of the unpaid wages from the producer's allotment payments for the benefit of the worker. The regulations (7 C.F.R. §§ 862.17, 863.33, and 864.28) require disputed wage claims to be submitted by the worker to the local Agricultural Stabilization and Conservation County Committee. Appeals are taken to the State Agricultural Stabilization and Conservation Committee and from there to the Secretary of Agriculture. The Secretary's decisions are reviewable under 28 U.S.C. § 1337 and the Administrative Procedure Act (5 U.S.C. § 704), despite the lack of express mechanisms for appellate review. See *Rodriguez v. Zimbelman, supra.*

V. Farm Labor Contractor Registration Act of 1963

A. General

This Act, regulating farm labor contractors, appears at 7 U.S.C. §§ 2041-2053. The regulations issued by the Secretary of Labor in 1971 are at 29 C.F.R. §§ 40 *et seq.* The Act is sometimes called the Crew Leader Registration Act because most contractors are crew leaders.

The statute, 7 U.S.C. § 2043, requires every person acting as a farm labor contractor (as defined in the Act) to obtain a certificate of registration from the Secretary of Labor. The application for registration must contain evidence of insurance or proof of financial responsibility (7 U.S.C. § 2044(a)(2); 29 C.F.R. § 40.4(e)). Before any person may transport migrant workers, he must submit evidence that he is in compliance with applicable rules and regulations of the Interstate Commerce Commission (29 C.F.R. § 40.4(f)). Registration can be revoked by the Secretary of Labor after an administrative hearing (7 U.S.C. § 2044(b); 29 C.F.R. § 40.16 *et seq.*).

B. Statutory Protections

The statute (7 U.S.C. § 2045) seeks to protect workers against misinformation, or lack of information, and to compel fair dealing on the part of crew leaders by requiring them to disclose information to the workers at the time they are recruited regarding the terms and conditions of the employment, housing, transportation, and insurance. The crew leader is required to tell the workers the amount he will charge them for his services. He must keep payroll records for them and furnish them itemized written statements showing the amount of their pay and deductions. The Act also seeks to protect workers against the risks of being transported by uninsured crew leaders.

C. Remedies for Violations

The types of violations most frequently encountered are promising work that does not exist, failing to pay wage rates that have been agreed upon, withholding wages that are due, making unlawful deductions, charging workers high interest rates on loans, failing to keep required records, and failing to register or obtain a certificate. The statute gives the Department of Labor authority to initiate investigations and enforcement action, but the Department has a total enforcement staff of only five officials for the entire country. As a result, it has not enforced the Act energetically but has relied instead on complaints from workers. The fear of retaliation and blacklisting has tended to reduce the number of complaints that are made.

The statute (7 U.S.C. § 2044(b)) provides for an administrative hearing in the Department of Labor leading to a contractor's losing his certificate for any of a number of violations specified in the Act, including knowingly giving workers false information regarding employment, failing without justification to perform agreements with farm operators or migrant workers, failing to keep his insurance in force, and failing to comply with I.C.C. regulations. The administrative proceedings are subject to court review under the Act (7 U.S.C. § 2049).

The statute (7 U.S.C. § 2048) also provides for criminal prosecution of willful violations of the Act or the regulations with a maximum penalty of a $500 fine.

Although the terms of the Act do not expressly provide a private remedy for workers, such a remedy was held to be implied by the United States District Court for the District of Idaho in *Salinas v. Amalgamated Sugar Co.*, Civil No. 1-70-108 (National Clearinghouse No. 5062 c). In an order dated January 26, 1971, the Court denied a motion to dismiss a complaint filed by farmworkers against a single defendant sugar processor who, it was alleged, also operated as a farm labor contractor but whose agents misrepresented the housing conditions when they recruited the plaintiffs for work. (After a trial on the merits the case was decided in favor of the defendant.) More recently the United States District Court for the District of Colorado in *Sanchez v. Great Western Employment Agency*, No. C-2616 (National Clearinghouse No. 5606), held that the Act did not create a private federal remedy because it contained provisions for government enforcement

through licensing and criminal proceedings. Private parties' only remedies for false representations by contractors, the Court held, were in state court actions for breach of contract or false representation. This case is pending appeal in the Tenth Circuit.

Federal jurisdiction in private suits filed by migrants on the implied remedy (assuming a private remedy exists) would be based on 28 U.S.C. § 1337; the Farm Labor Contractor Registration Act regulates Commerce. (See the Congressional declaration of policy in 7 U.S.C. § 2041).

D. The Farm Labor Contractor Registration Act in Future Cases

The statute is not effective because it is not enforced. The threat of loss of a certificate is not taken seriously by crew leaders, many of whom do not register at all. In future cases, however, the private remedy may be used to support a contract or tort action for damages in those courts where such a remedy is recognized. Even if a private remedy is not available to migrants, the duties imposed by the Act and the standards set by its provisions should be given effect by the courts in common law tort and contract actions.

VI. Interstate Commerce Act (Transportation Regulations)

A. General

The "Interstate Commerce Act, Part II; Motor Carriers" at 49 U.S.C. § 304(a)(3a) originally required the Interstate Commerce Commission "to establish for carriers of migrant workers by motor vehicle reasonable requirements with respect to comfort of passengers, qualifications and maximum hours of service of operators, and safety of operation and equipment." The I.C.C. was given enforcement authority by 49 U.S.C. § 304(c).

When the Department of Transportation was organized, the I.C.C.'s responsibility to regulate motor carriers of migrants was transferred to the Secretary of Transportation by 49 U.S.C. § 1655(e)(6)(C), and the enforcement authority was transferred to him by 49 U.S.C. § 1655(f)(2). Those functions, powers, and duties were delegated to the Federal Highway Administrator by 49 U.S.C. § 1655(f)(3)(B).

B. Statutory Protections

The regulations on "Transportation of Migrant Workers", 49 C.F.R. § 398.1 *et seq.*, were issued in compliance with the statute, 49 U.S.C. §§ 303, 304. These regulations seek to insure migrants' safety and comfort when they travel over long distances by motor vehicle. The regulations establish minimum qualifications for drivers of vehicles that haul migrants long distances, provide safety and comfort standards for such vehicles, limit the number of hours a driver may drive, and require the carrier to inspect and maintain each vehicle.

C. Remedies for Violations

Section 304(c) of the Act, 49 U.S.C. § 304(c), provides an administrative remedy of little direct value. It authorizes the I.C.C. (now the Federal Highway Administrator) on receipt of a complaint to investigate, to hold hearings and, if a violation of the regulations is shown, to "issue an appropriate order to compel the carrier . . to comply therewith". Rules of practice for such hearings are provided by 49 C.F.R. § § 386.1 *et seq.*

D. The I.C.C. Act in Future Cases

In *Zavala v. Helms & Williams, Inc.*, Civil No. 71-B-159, U.S. Dist. Ct., S.D. Tex., plaintiff migrants have sued their employer and crew leader for damages due to injuries and discomfort sustained on a 2300 mile truck ride from Texas to Oregon in the summer of 1971. They claim a civil remedy in their favor is implied by the Interstate Commerce Act and the transportation regulations under it. The defendants' motion to dismiss is pending.

Even if an implied civil remedy is not recognized in cases where the Act is applicable, proof of a violation of the regulations should be prima facie evidence of negligence in a suit for damages due to personal injury or wrongful death under state law. A violation of one or more of the regulations also could be shown to support a cause of action for damages in other tort cases, in contract cases, and in cases alleging a violation of the Farm Labor Contractor Registration Act or any other applicable regulatory statute.

VII. Immigration and Naturalization Act of 1952

The Act, 8 U.S.C. § § 1101 *et seq.*, provides in § 1182(a)(14) that aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor are excluded, unless the Secretary of Labor determines and certifies certain facts to the Secretary of State and the Attorney General. The terms of § 1182(a)(14) make clear that its purpose is to protect workers in the United States in their wages and working conditions against job competition from alien workers.

The statute provides for deportation proceedings by the Attorney General against the illegal alien (8 U.S.C. § 1252). The statute also imposes criminal penalties of up to five years' imprisonment and a $2,000 fine on any person bringing in and harboring illegal aliens (8 U.S.C. § 1324). However, the statute expressly provides that "employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring."

The level of criminal enforcement activity by the Department of Justice under the criminal provisions of the Act has been low and cases under 8 U.S.C. § 1324 have been difficult to prosecute successfully.

Efforts to establish an implied private remedy by domestic workers against employers of illegal aliens have been unsuccessful. In *Chavez v. Freshpict Foods, Inc.*, No. C-2486 (National Clearinghouse No. 4043), the United States District Court for the District of Colorado dismissed a complaint by domestic farmworkers against employers of allegedly illegal aliens on the ground that 8 U.S.C. § 1182(a)(14) did not imply a private remedy.

The remaining remedy appears to be administrative complaints to the Immigration and Naturalization Service of the Department of Justice. Such petitions can be backed by publicity or organized community pressure. Both I.N.S. and the legal divisions of the Department of Justice have a reservoir of administrative powers that should enable them to enforce the law against chronic offenders.

CHAPTER 4

CASES ARISING OUT OF BENEFIT PROGRAMS

I. Introduction

Migrant workers and their families are eligible for many programs of government assistance, some of which were enacted specifically for their benefit. However, migrants often fail to receive those benefits. This chapter discusses why and outlines the remedies that are generally available.

Many of the techniques of analysis and relief referred to do not need to be performed by lawyers. Most of the nonlitigative tasks can be done as well or better by non-professionals, such as outreach workers, or perhaps best by the migrants themselves with the support of lawyers and others as circumstances warrant.

Attorneys and outreach workers cannot represent migrants adequately with respect to benefit programs if they initiate their activities only when the migrants complain. Because of the nature of assistance programs, as explained in this chapter, these representatives must examine the performance of each program without waiting for complaints to be received, removing any obstacles that prevent migrants from receiving all of the benefits to which they are entitled.

II. Analysis of Benefit Programs

When eligible migrants fail to obtain some or all of the benefits of a government program of assistance, the failure usually is due to at least one of four reasons, as follows:

1. The program is not available where they live.
2. The migrants are unlawfully declared ineligible.
3. If the benefits must be applied for, the migrants do not apply.
4. They are not aware that they have been denied anything or subjected to discrimination, or that there is any reason to complain.

Often the benefits are in such a form that their absence is not apparent to the migrants. Also, sometimes the agency administering the program locally may conceal the program's existence or deny responsibility for providing the benefits. From the four basic reasons mentioned, a short list of questions can be formulated to identify the cause of any denial and to evaluate the performance of every important program of assistance applicable to migrants. This evaluation will indicate how the program needs to be remedied and what type of legal action should be taken.

Are benefits under this program available where the migrants live? Programs such as Social Security make assistance available to persons everywhere, but other systems, such as employment services, offer assistance only where government offices are located. A third category of program, of which Title I of the Elementary and Secondary Education Act is an example, provide benefits only where state or local officials (or sometimes private groups) apply.

If a program is offered at all locally, then the migrants' representatives should do something to obtain it, either by negotiating with local, state, or federal officials, in rare cases by bringing litigation, or by organizing a group to apply for the program. If the program is not available because the office is not conveniently located or adequately staffed or open during hours convenient for farmworkers, those conditions should be improved through negotiations, community pressure, and litigation.

Are migrants eligible for the benefits? Migrants may be made ineligible for assistance (1) by the terms of the benefit statute, (2) by the terms of a state regulation under a federal benefit law, or

(3) by the way officials in the local office interpret the written laws and regulations or exercise their discretion where the laws or regulations are silent or vague.

Any of the foregoing reasons for ineligibility may be unlawful. The restrictive eligibility provisions of the benefit statute may be unconstitutional. If the eligibility provisions are contained in a state statute, they may be in conflict with a federal law and in violation of the Supremacy Clause of the Constitution. The state regulations for a federal benefit program also may violate the Supremacy Clause for the same reason. In all of the foregoing cases, the migrants should have a remedy by a court suit against the officials in question. If the administrators' interpretation of the eligibility standards or their exercise of discretion in determining eligibility is contrary to the Constitution or the federal benefit law, or is arbitrary, the migrants may have an administrative remedy, a civil action, or both.

If the benefits must be applied for, do the migrants apply? Hospital care under the Hill-Burton Act and food stamps are examples of benefits that poor persons usually must apply for. Assistance under some other programs is intended to be furnished to beneficiaries without their having to make a separate application—for example, education programs under Title I of the Elementary and Secondary Education Act.

If migrants fail to receive benefits for which they must apply, the reason may be the way the program is administered. The migrants may be unaware of the program or may not know how to apply, or officials may operate the program in a manner that discourages applications. Sometimes a third party may be interfering with the migrants' use of the program.

Whatever the facts, migrants' representatives will probably have to investigate the situation on their own initiative, without waiting for migrants to complain, by taking the following steps:

1. Determining whether migrants actually apply for the benefits, and, if not, the reason for their failure to do so;
2. If the obstacle to their applying is within the program or its administration, removing that obstacle by negotiations, administrative proceedings, or suit;
3. Persuading the migrants to apply and helping them with the correct procedures;
4. If it is discovered through follow-up interviews that the migrants did apply but still failed to receive assistance, remedying the inequity through negotiations with agency officials, administrative proceedings or lawsuits.

If migrants fail to receive all of the benefits to which they are entitled under the program, do they realize that fact? The answer to this question depends on the form of the benefits and on whether the denial is complete or only partial. With benefits such as job training conducted by a state employment service, it is difficult for an intended beneficiary to tell when he has been subjected to discrimination or denied service in some other way.

A related question is whether migrants who are denied benefits will be aware of that fact in time for the denial to be corrected. The answer to this question depends also on the timing of the benefits. If an employer fails to make Social Security payments to his employee's account, the employee probably won't discover the fact for years. By contrast, when a hospital rejects a migrant as a patient or a local welfare office declines to sell a migrant food stamps, the denial is immediately obvious.

Where the absence or denial of benefits will not be apparent to the migrants, their representatives should take preventive and follow-up action to protect them, by first asking the persons responsible whether they will provide the benefits, to whom and in what amounts, and how the amount of benefits will be computed. After the benefits are due they can check to see that they were paid. If, for example, both the grower and the crew leader disclaim any obligation to make Social Security payments on behalf of migrant workers, counsel for the workers can file suit to have the question decided in advance. After the payments are due, employees can obtain a statement of

their account from the Social Security Administration by using a postcard form that is available at Social Security offices. See 42 U.S.C. § 405(c)(2).

III. Remedies

Since the denial or absence of benefits cannot always be remedied by litigation, preventive action and nonlitigative techniques are appropriate more often in connection with benefit programs than with other legal problems of migrants.

There are three basic approaches to relief where benefits are being lost: informal negotiations, administrative proceedings, and lawsuits. Each approach may be more effective if coordinated with community pressure to open up as many of the administration's practices as possible to public view and, thereby, to permit members of the beneficiary groups to participate as advisors or as members of the program's staff.

A. Negotiations

Informal complaints to the administrators are probably most effective where there is a clear violation of a written law or regulation, where migrants have been subjected to flagrant, abusive treatment, or where there is a strong, vocal client group to bring pressure. Where it works, negotiating often brings results faster than any other approach. One of the main reasons migrants lose benefits is delay in processing applications. One of the main reasons they often have no practical remedy is delay in formal legal and administrative proceedings. Under the circumstances the ability to negotiate effectively with local agency officials from strength is indispensable. Negotiations probably will be successful only in those cases where migrants' representatives prepare in advance by interviewing all interested persons and witnesses thoroughly, documenting the case carefully, and planning the litigation they will file if the negotiations produce an unacceptable result.

B. Administrative Proceedings

Where a fair hearing or some other administrative procedure is available which can provide an adequate remedy, the migrants may have to resort to it before filing suit. (See Chapter 8, Federal Jurisdiction and Venue in Migrants' Cases.) Counsel for migrants should demand a fair hearing in every case in which he is negotiating with the administrators on behalf of an individual who has been denied benefits. A demand for a fair hearing preserves the migrant's right to administrative review and serves as an indirect complaint to the federal granting agency. For example, when a fair hearing is demanded in the food stamp program one copy of the demand goes to the state officials and another copy is delivered to the regional office of the Department of Agriculture.

When administrators unlawfully deny benefits to many persons, counsel for the beneficiaries may demand administrative proceedings for all of them. A mass fair hearing for a large number of individuals on a single, common issue can give the system a jolt. It should be used only on the basis of accurate facts and where the administrators' practices are unlawful and affect many persons seriously. It is probably most effective where the administrators have abused the discretion which they are permitted to exercise because the laws and regulations in question are silent or vague. However, if abused, the mass fair hearing technique would harass public officials unfairly and would reduce the effectiveness of the technique in future cases.

C. Lawsuits

A lawsuit may be filed where the federal benefit law is unconstitutional or where the written regulations or the granting agency's administration of the program is unconstitutional or in violation of the benefit law. Suit also may be filed where the state program, either as written in state statutes, the state "plan," state regulations and administrative manuals, or as administered by state and local officials, violates the Constitution or is in conflict with the federal benefit law and regulations. *Rosado v. Wyman,* 397 U.S. 397 (1970); *Goldberg v. Kelly* 397 U.S. 254 (1970). Suit may be filed where state and local agencies and private organizations receiving federal assistance violate the Civil Rights Act of 1964. (See Section V of this chapter.)

IV. Cases Involving Particular Benefit Programs

This section discusses some common problems migrants have under four representative benefit statutes in order to illustrate the approach presented in the preceding sections of this chapter. The programs are food stamps, employment services, hospital care, and education.

A. Food Stamps

The purpose of the program under the Food Stamp Act, 7 U.S.C. § 2011 *et seq.*, and its regulations, 7 C.F.R., Parts 270-274, is to "permit low-income households to purchase a nutritionally adequate diet through normal channels of trade." The granting agency, the Food and Nutrition Service of the United States Department of Agriculture, issues food stamps to state welfare agencies for sale through local outlets to eligible poor persons for less than the face value of the stamps. After the stamps have been used to buy groceries the Department of Agriculture redeems them at face value. Normally, the county board of supervisors or other governing body decides whether the county will have a food stamp program or a commodity distribution program.

The following examples illustrate the problems migrants confront in counties where food stamps are sold.

Difficulty in applying for certification. In many counties the welfare office is located in an area that farmworkers cannot reach easily, the office hours are limited, and the staff is too small to serve applicants with reasonable promptness. The resulting delay in certification may cause a complete denial of benefits if the migrants must leave for their next job before they are certified.

Restrictive eligibility standards as applied by local welfare officials. Migrants often are denied the right to buy food stamps because they cannot prove to the satisfaction of the certifying officials the amount of their income and other resources or because the officials include anticipated earnings from farm work in the computation of the migrants' income.

Difficulty in obtaining stamps. In many rural areas food stamps are sold only at banks during banking hours, so that farmworkers must miss work and find private transportation to buy them.

The two basic complaints underlying the problems just mentioned are that the program is not readily available where the migrants live and that they are unlawfully denied eligibility. Inconvenience due to the location, office hours, or staffing of the certification office and the food stamp distribution points probably can be remedied through negotiations with local officials, especially if

the migrants' representatives can suggest specific ways in which the service can be improved. However, if the inconveniences in using the food stamp system are so serious as to constitute a denial of the benefits of the program, and negotiations fail, a lawsuit against the agency may be the only remedy. Where eligibility is denied unlawfully or in an arbitrary manner, the migrants may have a right to fair hearings or lawsuits. Migrants' need for assistance before they move on to the next job can be met only if their counsel has the ability to negotiate successfully with local officials and, where necessary, to obtain emergency court relief against them.

B. Employment Services

Under the benefit provisions of the Wagner-Peyser Act, the United States Training and Employment Service of the Manpower Administration in the Department of Labor provides all of the funds for the nationwide system of state employment services which furnish job counseling, training, and placement to workers. (The regulatory aspect of the Act was discussed in Chapter 3.) The benefits are in the form of service by staff members at the various state employment service offices and training centers. Some persons participating in training programs receive money grants.

A separate unit within the Manpower Administration, called the Rural Manpower Service or RMS (formerly the Farm Labor Service), has the stated mission of offering full manpower services to rural workers in order to decrease the supply of unskilled farmworkers. An administrative petition, *NAACP, et al. v. Shultz*, filed in 1971 with the Department of Labor by California Rural Legal Assistance and Migrant Legal Action Program on behalf of 21 organizations interested in the welfare of farmworkers, caused the Department to investigate the Rural Manpower Service. The resulting report, "Review of the Rural Manpower Service," April 22, 1972, detailed the failure of RMS and the state employment service offices that operate its program on a local level to serve farmworkers in several respects. The findings include racial discrimination and sex discrimination in job placement and the segregation of offices for farmworker applicants, which resulted in the failure to offer them the full range of employment services that were available to other workers at other offices in the same area. The report also specified several ways in which RMS and other agencies within the Department failed to enforce regulatory statutes intended to protect farmworkers. The Secretary of Labor has promised to take remedial steps involving a reorganization of RMS.

The immediate problem with which migrants and their representatives must contend under the benefit provisions of the Wagner-Peyser Act can be characterized as follows: The full range of employment services is not readily available to migrants. Instead, RMS officials often limit themselves to filling farmers' job orders. Most benefits under state employment service programs, such as job training, counseling, and placement, must be applied for; but, except for job placement in farm labor, migrants and their representatives do not know what programs are available or how to apply for them. Consequently, they are usually unaware when migrants are receiving less than the full benefits to which their circumstances entitle them. Even when there are flagrant violations of law which would support a suit against the officials of the employment service of RMS (for example, discrimination on account of race or national origin in violation of Title VI and Title VII of the Civil Rights Act of 1964), the facts do not come to the attention of the migrants or their representatives.

Summarized briefly, the complaints are as follows: The full program is not available or offered to migrants. Benefits must be applied for, and migrants fail to apply because they are unaware of the programs. Benefits are such that denial or discriminatory reduction is not apparent to the migrants.

Until effective reforms are implemented within the Department of Labor and the various state employment services, the initiative in remedying the foregoing situation must be taken by migrants' representatives. They need to identify the employment service programs that would be of greatest benefit to migrants in the area and then negotiate with local officials of the state employment service to make the agency's activities responsive to the migrants' needs. Eventually, when migrants use the employment service system, counsel should develop monitoring procedures to insure fair treatment for the migrants and file lawsuits to support and protect migrants in their dealings with the system.

C. Hospital Care

The Hill-Burton Act, 42 U.S.C. § 291, provides grants to states for the construction of public and other nonprofit hospitals by state and local governments or by public or other nonprofit agencies. Pursuant to § 291c(e)(2), the regulations, 42 C.F.R. § 53.111, in effect require hospitals that have received Hill-Burton funds to "furnish below cost or without charge a reasonable volume of services to persons unable to pay therefor."

In practice, many hospitals that have received Hill-Burton funds appear not to have recognized their obligation under the law. They reject patients who are not covered by insurance or cannot pay in advance. They do not determine whether those patients are eligible for free or reduced cost service. However, sometimes a patient about to be rejected mentions Hill-Burton and is accepted.

Migrants often are not aware of Hill-Burton benefits, do not realize that they are eligible, and fail to obtain hospital care for themselves or their children because they cannot afford it. They may allow themselves to be turned away from a hospital because they do not understand that under that hospital's procedures they must request free service or lose it.

A proposed revision of the regulations, 42 C.F.R. § 53.111, published April 18, 1972, at Federal Register Vol. 37, No. 75, pp. 7632-7634, would establish standards for determining for each hospital the level of uncompensated services which constitute a "reasonable volume" of services for persons unable to pay therefor. The revised regulations also would establish a state compliance review procedure.

Meanwhile, migrants' representatives should take the following steps:

1. Negotiate with hospitals in the area to determine what a "reasonable volume" of free or below cost service for poor persons would be. (The proposed revised regulations would create a presumption that a hospital is in compliance if it budgets for the support of, and makes available on request, service equal to 5% of operating costs or 25% of net income, whichever is higher.)
2. Negotiate with each hospital to have it (1) include that amount as an expense in the hospital's annual budget, and (2) adopt a procedure by which emergency room personnel and others who meet incoming patients offer the care required by Hill-Burton to poor patients without their having to demand it.
3. Inform migrants of which area hospitals are covered by Hill-Burton regulations and notify them that they and their families are eligible for free or below cost service at these facilities.
4. File suit against hospitals that reject poor persons without first having fulfilled their obligations under the regulations to provide a reasonable volume of services to persons unable to pay.

D. Education

Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 241e *et seq.*, 45 C.F.R., Part 116, provides financial assistance to school systems that have high concentrations of low income children living within their district. The Act also contains a special program sometimes called "Title I - Migrant" for children of migrant agricultural workers, 20 U.S.C. § 241e(c). Both programs are entirely federally financed and require no matching grants.

Under the general Title I program the Office of Education of the United States Department of Health, Education, and Welfare grants funds to states for distribution to local school districts which submit project applications to the state department of education. Under the migrant program local school districts do not apply for funds. Instead, the state department of education applies to HEW, receives funds from it, and conducts the program, often through the local school district.

Title I money is intended to be used to meet the special needs of educationally deprived children and not to meet the entire student body in a school or in a particular grade within the school. 45 C.F.R. § 116.17(g). They are required to be used to supplement state and local funds, not to replace them. 45 C.F.R. § 116.17(h).

Many schools attended by migrants' children receive funds under one or both Title I programs. The main problem in determining whether they are receiving all of the benefits to which they are entitled under the law is that no one can detect that benefits are denied until an audit is performed. Thus the fact question, whether benefits are being received, must be investigated by migrants' representatives on their own initiative and without waiting for complaints.

The Harvard Center for Law and Education offers legal services attorneys a "Title I Litigation Packet" containing instructions for conducting a Title I audit and filing suit where it is discovered that funds have been misapplied.

V. Actions under Title VI of the Civil Rights Act of 1964

A. General

In cases where migrants are denied benefits because of race or national origin, they have a remedy under Title VI (42 U.S.C. § § 2000d *et seq.*), which provides that "No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The statute covers programs of indirect assistance, that is, programs in which a federal agency provides benefits to beneficiaries through a "recipient." For example, in the commodity distribution program, the Department of Agriculture (federal granting agency) delivers food to a state welfare department (recipient) for delivery to poor persons (intended beneficiaries). In programs under the Elementary and Secondary Education Act, the Department of Health, Education, and Welfare (federal granting agency) pays money to a state department of education (recipients) for the benefit of students (intended beneficiaries).

Title VI regulates the way in which "recipients" (usually state and local agencies) administer programs that receive federal assistance. It does not regulate programs of direct assistance, such as social security retirement and disability benefit programs, where payments are made directly by a federal agency to the intended beneficiaries.

B. Enforcement Responsibility of Federal Agencies

Administrative proceedings. The statute, 42 U.S.C. § 2000d-1, places responsibility for enforcement on the granting federal agency and provides that in case of violation the granting agency may conduct an administrative hearing to cut off the assistance. The agencies administering programs covered by Title VI have issued regulations identifying the programs covered and providing for administrative enforcement. (The regulations are being revised and made uniform.)

Civil suits. Executive Order 11247 (3 C.F.R., 1964-1965 Comp., pp. 348-349) provides for the Attorney General to assist the granting agencies to coordinate their programs and adopt consistent and uniform policies. The Attorney General's 1965 guidelines (28 C.F.R. § 50.3) under the Executive Order state that Title VI may be enforced by civil suit by the Attorney General as well as by administrative proceedings. On several occasions the Department of Justice has filed civil suits for injunction against recipients on request by the granting agencies. However, as interpreted by the Department of Justice to date, Title VI does not authorize the Department to file suit on its own initiative without a referral from a granting agency.

C. Private Remedies

Intended beneficiaries have an implied cause of action against the recipients to enforce their rights under 42 U.S.C. § 2000d. *Bossier Parish School Board v. Lemon*, 370 F.2d 847, 851-852 (5 Cir. 1967), *cert. denied*, 388 U.S. 911 (1967). Where the federal granting agency has participated in the discrimination, the intended beneficiary has an action under the Fifth Amendment to the Constitution against the granting agency as well as an implied remedy under Title VI against the recipient. *Hicks v. Weaver*, 302 F.Supp. 619 (E.D. La. 1969). In many cases where intended beneficiaries have an action under Title VI against state or local government officials, they also have an action against those same officials under 42 U.S.C. § 1983 and under either 42 U.S.C. § 1981 or § 1982. (See *Hicks v. Weaver, supra.)*

CHAPTER 5

CONTRACT CASES

I. Introduction

Migrants contract for jobs and housing in stream states in several ways. Among the most common are the following:

1. Under the interstate recruitment system established by the Wagner-Peyser Act, a grower in a stream state places an order with his local state employment service office, requesting workers for a certain crop in the coming season. The employment service fills the job order, usually by sending a clearance order to the state employment service in a home base state, which recruits the requested number of workers and notifies them when and where to report for work.
2. A grower in a stream state recruits workers through a private employment agency, which may or may not be a subsidiary of the canner or packer with whom he has an output contract.
3. A crew leader recruits workers on direct order from a grower or his agent.
4. A family of migrants, who have worked in the stream in past seasons, contracts with a grower directly in advance of the season.
5. A family of migrants sets out for the stream states at the start of the season and picks up jobs and housing wherever they can, dealing directly with growers, crew leaders, and labor camp operators as circumstances warrant.

Employers and landlords acquire more obligations under agreements resulting from some of these contracting methods than others. For example, a grower who uses the interstate recruitment system has an obligation to comply with the health and housing regulations adopted by the Department of Labor under the Wagner-Peyser Act. (See Chapter 3.) By contrast, a grower who makes an oral agreement directly with a migrant worker during the season usually has few obligations beyond paying at the rate agreed upon and, absent a retaliatory motive, is normally free to terminate the migrant's job and housing at will.

Sometimes employers or others with whom migrants contract fail to perform their agreements. For example, migrants recruited in Texas for jobs in Indiana may discover when they arrive at the work place that there are no jobs for them because too many workers were recruited. They may find that the housing provided is unsafe or unhealthy, contrary to the employer's promises. They may be offered a lower pay rate than was originally agreed upon. On occasions where migrants have done some of the work, the employer or crew leader may deduct charges from their pay that were not previously discussed.

II. Contract Remedies in Migrants' Cases

Promises to migrants in employment contracts may be enforced by suits for breach of contract or fraud. Where a third person interferes with migrants' jobs, housing, travel, or working conditions by causing them to be fired or evicted, for example, the migrants may have a tort action against him. In suits based on any of the foregoing theories, plaintiff's counsel should also add claims for violations of regulatory statutes such as the Wagner-Peyser Act or the Fair Labor Standards Act, where they are applicable. (See Chapter 3, Cases Based on Regulatory Statutes.)

A. Suit for Breach of Contract

State law determines which material facts must be alleged and proved and the type of relief that is available in a suit for breach of contract. In most cases the complaint should allege facts showing the following:

1. The existence and terms of the agreement, including (a) the approximate date the agreement was made, (b) who made it, (c) how it was made (usually by describing a conversation or other act between the parties, (d) the specific terms (if possible, by attaching a copy of the written document or alleging why a copy is not available to the plaintiff), and (e) any circumstances that further clarify the terms;
2. The plaintiff's performance of his obligations, his readiness to perform, or his detrimental reliance on the defendant's promise;
3. The defendant's breach of the agreement; and
4. A right to relief.

Remedies for breach of contract cases are discussed in Chapter 2, Retaliatory Firing and Eviction.

Breach of contract in clearance order cases. An employer seeking to obtain workers through the interstate clearance system submits a local office order (Form ES-522) at an employment service office. The order is to specify the job, the beginning and ending dates of the job, the pay rate, the working and living conditions, and the number of workers needed. If workers cannot be found locally, the employment service circulates to employment service offices elsewhere an inter- and intrastate clearance order (Form ES-560A), containing information on the employer and the job as shown in the local office order. If a crew leader appears at an employment service office and accepts the responsibility to provide workers (or if an individual worker goes to an office and accepts one of the jobs), the acceptance is communicated to the employer. Crew leaders often recruit workers solely on the basis of the description contained in the clearance order.

Where migrants deal with the employment service directly and accept jobs on the basis of the employer's statement of terms in a job order or clearance order, ordinary contract principles should give them a cause of action against the employer for his breach of any of those terms. Where migrants have been recruited on the basis of a crew leader's statements regarding terms of employment and living conditions at the work place and those terms and conditions are breached, the migrants should have (1) an action against the crew leader on their contract with him and (2) an action against the employer as third party beneficiaries of the contract between the employer and the crew leader, which was based on the clearance order specifying working and living conditions. 17A C.J.S. *Contracts* § 519(1) *et seq.*

In addition to contract claims, the workers should have claims against the employer and crew leader for violation of any applicable regulatory statutes such as the Wagner-Peyser Act (see *Gomez v. Florida State Employment Service*, 417 F.2d 569 (5 Cir. 1969)) or the Fair Labor Standards Act. (See Chapter 3, Cases Based on Regulatory Statutes.)

B. Fraud

Where some person knowingly makes a false representation to migrants intending for them to rely on it and they do so without knowing it is false, they have an action for compensatory and punitive damages against that person. 37 C.J.S. *Fraud* § 3.

C. Tortious Interference

Where migrants have been hired for a job and a third party causes their employer to fire them or to refuse to put them to work, where they are living in a labor camp and a third party causes their landlord to evict them, or in any of a number of similar situations, the migrants may have an action against the third party for tortious interference with the performance of a contract or with a prospective financial advantage.

The facts that are required to state a claim vary according to the common law of different states. See Prosser, *Law of Torts* (4th ed. 1971), pp. 927-949; Annotation "Liability for Procuring Breach of Contract," 26 A.L.R. 2d 1227 (1952); Annotation, "Interference with Business Relationship" 9 A.L.R. 2d 228 (1950). The following outline of material facts to be alleged and proved by the plaintiff should be adequate to guide a preliminary investigation in any state.

1. A contract between the migrant and another party;
2. Interference by the defendant;
3. Intent–(a) the defendant knew of the migrant's interest and (b) the defendant committed the acts that caused the interference intentionally (not negligently);
4. Resulting injury to the migrant; and
5. Absence of privilege on the part of the defendant.

The contract may be terminable at will, as in *London Guarantee and Accident Co. v. Horn*, 206 Ill. 493, 69 N.E. 526 (1903), or, under some states' law, the contract may be unenforceable. Nevertheless, as in an action for retaliation, an act terminating the relationship, which otherwise would have been lawful, can subject the person responsible to liability. In such cases both compensatory and punitive damages are recoverable.

Growers, canners, and packers may recruit migrants through state employment services, private employment agencies, crew leaders, or other migrants. Two basic questions are presented in such cases, the answers to which depend on the applicable state law of agency. First, who is the migrants' employer? Second, can the employer be held liable to the migrants for the acts and representations of the middle man in any of the above situations?

Under the law of master and servant, the migrant's employer is the person or firm having the right to control the way the migrant does his work. (See 53 Am. Jur. 2d *Master and Servant* § 2.) In most cases where the only intermediary is a state employment service or a private employment agency, it is clear which parties are employer and employee. However, where workers contract with a crew leader or with a person or firm other than an employment agency, the migrants may be the employees of that person and not the grower or packer who owns the crops.

Where an employer allows an employment agency, a crew leader, or someone else to hire workers for him, the employer will be responsible for any agreements the agent was expressly or apparently authorized to make and any unauthorized agreements the employer has ratified. (See 3 Am.Jur. 2d *Agency* §§ 69*et seq.*, 160 *et seq.*) Generally, under the doctrine of *respondeat superior*, the employer as principal will be responsible for the results of activities which he has given the agent the power to perform, which he has the right to control, and which are undertaken to further this interests, even though the activities may not have been specifically authorized.

IV. Choice of Forum

As mentioned in Chapter 11, Preparing and Filing a Complaint, many migrants' cases have contacts with several states and with different counties and federal judicial districts within a state. This is especially true of contract cases, where an employer in a stream state hires migrants in a home base state either directly or through third parties. The considerations mentioned in Chapter 11, on choosing the court in which to file suit, are applicable to contract cases.

A. Home Base State or Stream State

The decision where to file suit on an interstate contract depends on several factors, including convenience to the migrants and their witnesses, availability of any records involved in the case, and favorable rules of law on such subjects as conflict of laws and remedies. One of the most important questions bearing on the decision is whether personal jurisdiction can be obtained over all of the defendants in the home state of the plaintiff migrants.

The three principal home base states, Florida, Texas, and California, have long-arm statutes that favor residents by broadly extending the jurisdiction of local courts over persons and firms outside the state. Chapter 48 of the Florida Statutes, "Process and Service of Process", provides for substituted service of process on nonresident persons and corporations engaged in business in the state (2F.S.A. § 48.181) and on "nonresidents committing a wrongful act outside the state which causes injury within the state" (2F.S.A. § 48.182).

Under the Texas statute (Vernon's Ann. Civ. St. Art. 2031b), any foreign corporation or nonresident person who enters into a contract "by mail or otherwise with a resident of Texas to be performed in whole or in part by either party" in Texas or who commits "any tort in whole or in part" in Texas is subject to suit in Texas courts. The statute has been interpreted in contract cases as broadening the reach of Texas courts to the fullest extent permissible under the Constitution. *Atwood Hatcheries v. Heisdorf and Nelson Farms*, 357 F. 2d 847 (5 Cir. 1966).

The California statute has the broadest language of all. "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." (West Ann. Cal. Civ. Pro. Code, § 410.10)

Whether these statutes can be applied constitutionally in migrants' cases to reach employers and other defendants who are not present in the home base state should depend on whether the facts of each case disclose (1) that the defendant took voluntary action calculated to have an effect in the forum state, (2) that the forum state has a constitutionally permissable interest in the outcome of the suit, and (3) that it would not be unfair to subject each of the defendants to home base state jurisdiction. *Rosenblatt v. American Cyanamid Co.*, ____U.S. ___, 86 S.Ct. 1 (1965); *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); Currie, "The Growth of the Long Arm," 1963 U. of Ill. L.F. 533.

B. Federal Court or State Court

If federal subject matter jurisdiction is present (see Chapter 9, Federal Jurisdiction and Venue in Migrants' Cases), the choice of filing suit in federal or in state court should depend largely on whether the broad discovery provisions of the Federal Rules of Civil Procedure are superior to the discovery provisions of state law and, if so, whether this is a significant advantage in the particular case. Rule 4(d)(7) gives plaintiffs in federal court the advantage of the local state long arm statute, so obtaining personal jurisdiction over the defendants probably will not be a decisive consideration in interstate cases.

PART II

PRELIMINARY CONSIDERATIONS

CHAPTER 6

IS THERE A CASE?

I. Introduction

This chapter describes some of the conditions characteristic of migrants' lives which affect litigation decisions by their counsel and outlines a technique for analyzing a new case to determine its merits before filing suit.

II. Characteristics of Migrants' Cases Which Affect Litigation Decisions

The facts bearing on decisions attorneys must make when they represent migrants in litigation are different in some respects from those in ordinary actions for damages and injunctions because of the circumstances in which migrants find themselves.

1. They are poor.
2. They are transient.
3. There usually is a wide disparity between the poverty and powerlessness of the migrant plaintiffs and the wealth and power of the defendants and consequently a wide disparity in their ability to use the procedures of the adversary system effectively.
4. Most migrants are Mexican-Americans or are black or are otherwise members of some group that is subject to discrimination because of race, national origin, or other background characteristics.
5. Many migrants do not speak or read the English language.
6. Their legal problems are not necessarily simple; effective representation of migrants often calls for complex litigation.
7. Migrants are heavily dependent on the growers, crew leaders, government officials and other persons who form the class of potential defendants in migrants' cases, and they are more vulnerable than most persons to out-of-court retaliation for seeking legal advice or filing lawsuits.
8. Migrants' and their friends' past experiences with the police, the law, and the courts often have been unfavorable, making them anxious to avoid courts and lawyers.
9. When migrants talk to lawyers, prepare for trial, and go to court as litigants and witnesses, even if they understand the words, due to cultural dissimilarities, they may perceive what is happening very differently from other persons.

Those facts have the following consequences in most migrants' cases:

1. Cost is a more important consideration in deciding whether or not to litigate, and, if so, which procedures to use.
2. Migrants' legal and personal problems are often more serious than those of other persons.
3. Their problems require faster solutions.
4. Migrants are under more and greater pressure not to take legal action on their own behalf.
5. As clients and witnesses, migrants often have difficulty communicating with lawyers.
6. When suit is filed, migrants are often unavailable for pretrial proceedings and court appearances.
7. Migrants often do not make a good impression on judges and juries who are not migrants.

These circumstances affect most of the decisions that migrants' counsel must make in the course of handling a case. They bear directly upon the analysis of the factual and legal components of the case set forth below.

III. Is there a case? How good is it?

The preliminary investigation, in migrant cases as in others, should focus on whether there is a cause of action; but in migrant cases it is especially important to give primary consideration to the human problem as opposed to the legal question. The following are the basic questions counsel should be asking himself in the initial interviews and throughout the preliminary investigation to determine if there is a case, how good it is, and whether a lawsuit should be filed or some alternative action should be taken.

A. Who is hurt?

Injuries should be considered first in the investigation and analysis of any set of facts that may lead to a lawsuit, administrative proceeding, or other form of action for relief. Persons who have suffered injury should be identified at the outset, and the investigation and eventual lawsuit should be directed principally toward remedying their problems. If a class of persons has sustained some sort of injury, the class should be similarly defined and described as early in the investigation as the necessary facts can be obtained.

Injuries, losses, and damage (in the wide sense of detriment, rather than in the narrow sense of money damages) deserve first consideration because without them there is no case and without serious injuries of some kind even the most perfect case on the law is likely to be unpersuasive to a trier of fact.

B. How are they hurt?

Elements of injury. The elements of injury in migrants' cases can usually be grouped into three large categories—financial losses, personal injuries and sickness, and loss of human dignity or self-respect. Representative examples of financial losses would include the difference between the cost of food with and without food stamps (where unlawful restrictions on migrants' eligibility prevent them from obtaining food stamp benefits); lost earnings and impaired earning capacity due to missed opportunities for training through job experience or otherwise (*i.e.*, where an employer or state employment source systematically excludes migrants from consideration for better jobs for which they are qualified); excessive charges by growers or crew leaders for transportation, rent, or other services; and past and future medical, hospital and funeral expenses for accidents involving dangerous farm machinery or illness associated with pesticides.

Elements of damage for personal injuries or illness include the following (in addition to financial losses): the nature and extent of the injury or illness; disability due to the injury or illness; past and future pain and suffering; and any disfigurement that may have occurred.

Loss of human dignity or self-respect may be found to occur whenever migrants are segregated, cheated, excluded, restricted, or discriminated against, and whenever they are subjected to sub-standard housing and health conditions. Loss of dignity or self-respect on the part of migrants is associated with most of the common situations that give rise to migrants' litigation. Some examples

are growers' and crew leaders' interference with outsiders seeking access to migrant labor camps; employers' and crew leaders' violations of federal and state regulatory legislation, such as the Farm Labor Contractor Registration Act, the minimum wage provisions of the Fair Labor Standards Act, or the provisions against dangerous and offensive living conditions in the various states' health and housing codes; government officials' failure to implement assistance programs intended for migrants' benefit or their failure to enforce regulatory legislation passed for migrants' protection; and employers, crew leaders and landlords taking arbitrary deductions from migrant workers' pay or evicting and firing migrant workers in retaliation for their exercising constitutional or other legal rights.

Proof of injury. Injury is proved by comparisons. Each of the foregoing elements and varieties of injury should be substantiated by the type of comparison appropriate to the case.

1. **Before-and-after.** In most damage suits involving personal injuries and illness and in some suits involving financial losses resulting from a defendant's acts, each element of damage should be proved by comparing and contrasting the migrant plaintiff's condition before the occurrence complained of with his condition after the occurrence. Both the condition before and the condition after must be proved. There may be issues of fact involved in each of them and issues of law regarding the appropriateness of the comparison.

2. **Advantaged-and-disadvantaged.** In discrimination cases each element of damage should be proved by comparing and contrasting the condition of migrant plaintiffs, who are disadvantaged by the acts or omissions of a defendant, with the condition of others who are advantaged by the same acts or omissions. Where the only available comparison group consists of regular year-round residents of the community, or white persons, or English-speaking persons, the plaintiff may have difficulty proving racial discrimination of the sort apparently required by the federal civil rights laws. (See the introduction to Chapter 9, Private Remedies Under the Nineteenth Century Civil Rights Laws.) In a discrimination case improvements in the condition of the migrants in question are immaterial. Thus, a defense that the migrants were unemployed before but have jobs now should be unavailing. The point of a discrimination case is that the jobs they have now are not as good as the jobs they would have been offered if they had been white, or English speaking, or whatever the significant characteristic may be. Both the circumstances of the advantaged group and the circumstances of the disadvantaged group must be proved. There may be issues of fact regarding each of them and issues of law as to whether the comparison is appropriate.

In discrimination cases of all sorts, statistical evidence is helpful at trial. The availability of this type of proof, however, should not serve as an excuse for failing to investigate and document the human dimensions of the problems.

3. **Standard-and-substandard.** In most cases arising out of violations of statutes and rules intended to benefit migrants or protect them by setting standards to be observed by employers, crew leaders, landlords, government officials, and others who affect their lives, each element of damage should be proved by comparing and contrasting the migrant plaintiff's condition with the legal standard.

In cases of this type, as in discrimination cases, improvements in the migrant's condition after an occurrence are immaterial to liability. His rate of pay this week may be higher than his rate of pay last week, but if there is Fair Labor Standards Act coverage and both rates of pay are below the minimum wage, both rates violate the Act. In a case for violation of standards, the absence of discrimination is also immaterial. None of the growers in the county may be paying the minimum wage to any of their workers regardless of the workers' race, national origin, or any other characteristic; but if there is Fair Labor Standards Act coverage, the growers are liable to the workers for violating the Act.

In all cases the substandard conditions will have to be proved. It may or may not be necessary to prove the standard itself. If the standard is contained in a law or a regulation the court should take judicial notice of it. In contrast, if the standard of behavior is contained in an agreement between the parties, the existence and terms of the agreement will have to be proved and there may be issues of fact in that regard.

C. How much are they hurt?

When the elements of damage have been identified and the facts by which they can be proved have been obtained, counsel should evaluate the seriousness of the injuries. He should calculate the actual amount of any financial losses, verify the apparent seriousness of any personal injuries and illnesses, and examine carefully the persuasiveness of the objective facts indicating loss of dignity or self-respect. If the injuries are serious, the case merits further investigation and consideration. If the injuries are not serious, the case is questionable as a lawsuit unless some objective other than relief for the plaintiffs, such as establishing a point of law over weak opposition, is the chief purpose of the case.

D. How did it happen? What hurt them? Who is responsible?

Some cases are such that the migrants know most or all of the operative facts. Where a grower denies an outsider access to a migrant labor camp, or where a grower fires or evicts a migrant in retaliation for complaining about housing conditions, the events often occur in plain view of the person affected and other sympathetic witnesses. In these cases the cause of the injury usually can be determined from the participants' narrative of the events.

In many instances, however, the migrants and other sympathetic witnesses know only part of the story. These cases usually involve systems of administration such as a state employment service or health or welfare department, a corporate employer, a local school administration, or a federal agency. Understanding what caused the injury often requires interviews or depositions of persons employed by the administration in question and may call for a full study of the system's operation. The investigation should be directed to identifying the particular procedures the administrators followed, the standards they applied, and whatever other practices they employed which resulted in harm to the migrants.

The investigation should determine the person or firm or agency responsible for the injury. If it is discovered that there are additional persons who have the authority to prevent such injuries from happening in the future, counsel can consider whether they also should be made defendants, whether they should be brought into any negotiations that take place, or both.

E. What relief is necessary and appropriate?

The facts developed in the investigation should indicate whether money damages, an injunction, a declaratory judgment, or some other form of relief should be sought to provide a remedy for the injury and to prevent the same injury from being repeated in the future. Once the facts of the case are assessed, counsel should be able to determine the amount of damages and the general nature and terms of any injunction that should be requested. The facts also should alert counsel to any need there may be for emergency relief.

F. Is there a sound legal theory of liability and remedy?

A legal theory, the element many lawyers seek first when confronting an unfamiliar fact situation, should be looked for last. If the migrants have sustained a significant financial loss, personal injury, sickness, or loss of dignity or self-respect, and the investigation has identified the person or organization responsible and has determined the relief that is necessary and appropriate, a sound legal theory of liability and remedy probably can be found under the applicable constitutions, statutes, ordinances, executive orders, agency rules, administrative regulations, court rules, or common law. If not, a new rule may be needed and the case may be worth litigating for that purpose, as well as for the purpose of obtaining relief for the individual migrants in question.

CHAPTER 7

FINANCIAL ASPECTS OF MIGRANTS' LITIGATION

I. Techniques for Reducing Expenses of Litigation and Trial

The cash expenses of litigation include filing fees, fees to the marshal for serving summons, complaint, and subpoenas, witness fees, and court reporter fees for transcripts. Other expenses of investigation and litigation may be incurred either in the form of cash or attorney time as required to interview witnesses, research law, draft court papers and briefs, take depositions, argue motions, prepare and serve interrogatories and requests for admissions, answer interrogatories, inspect documents, and prepare and conduct trials. Attorneys representing migrants also have clerical expenses and office overhead.

Migrant workers and their families do not have money to pay the expenses of litigation. What money they do have is required to meet more immediate needs, such as food and clothing, and to pay debts that are already accumulated. In order for migrants to be able to litigate they must be relieved of litigation expenses, or find some way for those expenses to be paid, even where the litigation is necessary to protect their fundamental rights.

While all of the expenses of litigation cannot be eliminated, there are several ways in which they can be reduced. The government relieves poor persons of some of their legal expenses. One example of government aid is the Legal Services Program, which furnishes lawyers to poor persons. Further, § 1915 of the Judicial Code (28 U.S.C. § 1915) provides that persons who qualify to sue or defend *in forma pauperis* are relieved of paying some, but not all, of the cash charges ordinarily paid to court officials.

The law on taxation of costs, Federal Rules of Civil Procedure Rule 54(d) and 28 U.S.C. § 1920, enables a litigant who incurs expenses and wins a lawsuit to be reimbursed for some of his expenses by his defeated opponent. (The law cuts both ways. It increases expenses for a litigant who has costs taxed against him, and the risk of losing, however slight, serves as a further deterrent to litigation by the poor.)

Similarly, Rule 37, "Failure to Make Discovery: Sanctions," provides that a party who fails to comply with discovery rules or fails to comply with a court order compelling discovery may be required to pay the expenses, including attorney fees, incurred by other parties as a result of his failure. Here the expenses paid by the opponent are expenses caused by the opponent, not by the migrant. Thus, Rule 37 serves only to reduce the financial outlays in litigation against an oppressive adversary.

In extraordinary circumstances courts have issued orders intended to reduce the disparity between the parties in their ability to bear the expense of litigation and trial. For example, in suits by individual plaintiffs against airlines and other transportation companies, the defendants have been ordered to produce their employees for depositions at the place where suit was pending though the employees lived outside the jurisdiction and in some cases outside the country. See *Schultz v. K.L.M.*, 21 F.R.D. 20 (E.D.N.Y. 1957) and *Supine v. Compagnie Nationale Air France*, 21 F.R.D. 42 (E.D.N.Y. 1955). In a case under New York State practice, *Popper v. Northwest Airlines, Inc.*, 5 Av. Cas. (CCH) 18,212 (N.Y.Sup. Ct., 1958), plaintiff's counsel served notice of the depositions of nine employees of the defendant Northwest Airlines to be taken at Mineola, New York. Northwest objected that most of the witnesses lived in Seattle, Washington. The Court ordered the deposition to be taken in Seattle but ordered Northwest to pay plaintiff's attorney up to $1,500 in expenses, counsel fees, and disbursements in connection with the depositions, that amount to be taxed as costs and recovered by the defendant if it prevailed in the trial of the case. See also *Wallace v. Northeast Airlines, Inc.*, 5 Av. Cas. (CCH) 18,222 (N.Y.Sup. Ct., 1958). The

same result could be reached under Rule 26(c)(3) of the Federal Rules of Civil Procedure. Although most migrant cases will not involve airlines, they may present analogous factual situations to which the same balancing principle used in the airline cases could be applied to reduce the migrants' financial burden.

Two further techniques are available to migrants when they are outweighed financially by their opponents. First, they can use discovery procedures under which their opponents do most of the work. By serving interrogatories under Rule 33, the plaintiff may learn more economically what the defendant's records show than by inspecting the defendant's records on production pursuant to a Rule 34 request. (The defendant who receives interrogatories of this sort is protected by being given the option under Rule 33(c) of producing the records instead of answering the interrogatories, but only if "the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served.") Second, if an opponent refuses to make discovery, the migrant may obtain a court order under Rule 37(b)(2)(A), (B), (C) limiting the issues in the migrant's favor or limiting his opponent's proof, thereby reducing the financial requirements of the case.

Finally, a migrant who is unable to afford more expensive techniques of litigation and trial may forego them and substitute less expensive (though perhaps less effective) techniques. For example, instead of a deposition on oral examination under Rule 30, counsel for the migrant may have to settle for a deposition on written questions under Rule 31 or even less expensive interrogatories under Rule 33.

II. Specific Items of Expense

The following is a list of items of expense frequently incurred in litigation, showing the extent to which they are waived for parties authorized to proceed *in forma pauperis* and whether they may be taxed as costs, and in some cases explaining the use of less expensive substitutes.

A. Cash Payments to Court Officials

Filing Fee (28 U.S.C. § 1914(a)), ordinarily paid to the clerk when the complaint is filed, is waived for plaintiffs proceeding *in forma pauperis.* 28 U.S.C. § 1915(a). It may be taxed as costs. 28 U.S.C. § 1920(1).

Marshal's fee for service of summons and for mileage (28 U.S.C. § 1921), ordinarily paid to the clerk when the complaint is filed or to the marshal when the summons and complaint are delivered to him for service, are waived for persons proceeding *in forma pauperis*. 28 U.S.C. § 1915(c). They may be taxed as costs. 28 U.S.C. § 1920(1).

Marshal's fee for serving subpoenas and for mileage (28 U.S.C. § 1921), ordinarily paid to the marshal when subpoenas are delivered to him by the party requesting them, are waived for parties proceeding *in forma pauperis.* 28 U.S.C. § 1915(c). They may be taxed as costs. 28 U.S.C. § 1920(1).

Witness fees, mileage, and per diem (28 U.S.C. § 1821) are ordinarily paid to the marshal when subpoenas are delivered to him by a party for service on a witness. The fees are intended to defray the expenses of witnesses and are to be tendered to each witness when the subpoena is served upon him. 28 U.S.C. § 1825 provides, "In all proceedings, in forma pauperis, for a writ of habeas corpus or in proceedings under Section 2255 of this title, the United States Marshal for the district shall pay all fees of witnesses for the party authorized to proceed in forma pauperis, on the

certificate of the district judge." If there is any uncertainty whether the statute provides for payment of the witness fee, mileage, and per diem in all proceedings *in forma pauperis*, or only in proceedings *in forma pauperis* for a writ of habeas corpus, or in proceedings under 28 U.S.C. § 2255, the doubt should be resolved in favor of all proceedings. 28 U.S.C. § 1915(c) provides that in all proceedings *in forma pauperis* "Witnesses shall attend as in other cases." Unless the marshal advances the witnesses' fees, mileage, and per diem in those cases, witnesses usually cannot attend.

Fees and disbursements for witnesses may be taxed as costs. 28 U.S.C. § 1920(3).

Injunction bond. Rule 65(c) requires a party applying for an injunction or restraining order to give security to protect the defendant against any costs and expenses that may be incurred if he is found to have been wrongfully enjoined or restrained. Ordinarily, the party applying for the injunction pays a premium to a surety for a bond and files the bond with the clerk when the court is ready to grant relief. *Thermex Co. v. Lawson*, 25 F. Supp. 414 (E.D. Ill. 1938); 7 *Moore's Federal Practice*, ¶ 65.10[1]. However, plaintiffs proceeding *in forma pauperis* under 28 U.S.C. § 1915 are authorized to do so "without the prepayment of fees and costs or security therefor," and courts have relieved them from the requirement of a bond. *Denny v. Health and Social Services Board*, 285 F. Supp. 526, 527 (E.D. Wis. 1968). In *Powelton Civic Home Own. Ass'n. v. Department of H. & U. Dev.*, 284 F. Supp. 809, 839-841 (E.D. Penn. 1968), the Court held that despite the apparently mandatory language of Rule 65(c) the security requirement is within the court's discretion and that security should not be required in an amount that would deny the plaintiffs access to the court.

When an injunction bond is required, the reasonable expense of obtaining it may properly be taxed as costs. 6 *Moore's Federal Practice*, ¶ 54.77[8].

Court reporter's fee for transcript of a trial, hearing, or deposition. Each district court has an official court reporter (28 U.S.C. § 753) who is required to attend and record all proceedings held in open court, unless the parties specifically agree (with the approval of the judge) to the contrary. The official reporter also may attend and record depositions in cases pending in that court. 28 U.S.C. § 753(b) provides, "Upon the request of any party to any proceeding which has been so recorded *who has agreed to pay the fee therefor* or of a judge of the court, the reporter shall promptly transcribe" his records of the proceeding and deliver the transcript to the party or judge who made the request. [Emphasis added.] Section 753(f) provides that the United States may be required to pay the fees for transcripts furnished to parties proceeding *in forma pauperis* in criminal cases, on habeas corpus petitions, in motions attacking sentences, and on appeals; but it does not provide for fees to be paid or for transcripts to be furnished free to parties proceeding *in forma pauperis* in civil suits in district court.

The cases have repeatedly held that a party proceeding *in forma pauperis* in a civil suit is not entitled to a transcript of court proceedings or depositions free of charge (*i.e.*, paid for by the United States or produced by the court reporter without compensation). See, *e.g.*, *McClure v. Salvation Army*, 51 F.R.D. 215 (N.D. Ga. 1971); *Ebenhart v. Power*, 309 F. Supp. 660 (S.D.N.Y. 1969). Litigants challenging this rule in the future should note that, though the cases state the legal principle firmly, the facts in many of the cases are weak. For example, in the *McClure* case the court held that the plaintiff was no longer entitled to sue *in forma pauperis*. In *Ebenhart* the court held that the *in forma pauperis* motion for an order requiring the government to pay deposition expenses was defective because it was not supported by facts showing that such an order would be necessary and reasonable. Similar factual weaknesses can be found in the other cases cited in the *McClure* and *Ebenhart* opinions.

Fees which a party has paid the court reporter for all or any part of the transcript "necessarily obtained for use in the case" may be taxed as costs. 28 U.S.C. § 1920(2). The question, whether a transcript was necessary for use in the case, is to be determined by the district judge on the facts of

each particular case. The court reporter's fees for transcripts of depositions also may be taxed as costs, where reasonably necessary, for use in the case. *Advance Business Systems & Supply Co. v. SCM Corporation*, 287 F. Supp. 143, 161-166 (D. Md. 1968), *affirmed and remanded on other grounds*, 415 F.2d 55 (4 Cir. 1969), *cert. denied* 397 U.S. 920 (1970); *Hope Basket Co. v. Product Advancement Corp.*, 104 F. Supp. 444 (W.D. Mich. 1952); see 6 *Moore's Federal Practice*, ¶ 54.77[7].

The expense of taking depositions and preserving the testimony can be reduced by using non-stenographic means of recording. Rule 30(b)(4) provides as follows:

> "The court may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the order shall designate the means of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his own expense."

This provision was added to the Federal Rules in 1970 expressly to facilitate less expensive procedures, including mechanical, electronic, or photographic means of recording testimony. The requirement of a court order was included in the provision so the court could assure that the means of recording would be accurate and trustworthy. "Notes of Advisory Committee on Rules", 28 U.S.C.A. Federal Rules of Civil Procedure, Rule 30; 48 F.R.D. 487, 514.

Copying expenses. Courts have refused to furnish parties proceeding *in forma pauperis* with free copies of papers in court files. *Douglas v. Green*, 327 F.2d 661 (6 Cir. 1964); *Hullom v. Kent*, 262 F.2d 862 (6 Cir. 1959).

Miscellaneous: appointment of an attorney. 28 U.S.C. § 1915(d) provides, "The court may request an attorney to represent any such person [who makes an affidavit *in forma pauperis*] unable to employ counsel." This provision is not applicable to most migrant cases under present circumstances. Migrants do not usually get to court as plaintiffs in civil cases unless they already have a lawyer.

B. Other Expenses

The following items of expense, which are not payments to court officials, are not waived for litigants proceeding *in forma pauperis*. Some of these expenses can be taxed as costs under 28 U.S.C. § 1920. Moore states the general rule regarding taxation of costs as follows: ". . . the power or authority of the court to tax a particular expense item of litigation as costs must be found in a federal statute, rule of court, or in the custom, practice and usage applicable in a particular district." 6 *Moore's Federal Practice*, ¶ 54.77[1].

Attorneys' fees ordinarily may not be taxed as costs in the absence of a statute or valid contract therefor. See 6 *Moore's Federal Practice*, ¶ 54.77[2]; *Monolith Portland Midwest Co. v. Kaiser Aluminum & Chemical Corp.*, 407 F.2d 288 (9 Cir. 1969). However, 28 U.S.C. § 1923(a) allows an attorney's "docket fees" to be taxed as costs as follows: On final hearing, $20.00; on discontinuance of a civil action, $5.00; on motion for judgment, $5.00; and for each deposition admitted in evidence, $2.50.

Deposition expenses other than transcripts and witness fees and mileage, such as an attendance fee for the court reporter, a notarial fee, postage for mailing the transcript to the clerk's office for filing, and an interpreter's fee (where necessary), have been taxed as costs in cases where the deposition was reasonably necessary for use in the case; but traveling expenses for attorneys and

investigators in connection with depositions have been refused as costs. 6 *Moore's Federal Practice*, ¶ 54.77[4], *Hope Basket Co. v. Product Advancement Corp., supra*.

The expense of depositions can be cut sharply by substituting depositions on written questions for depositions on oral examination and by substituting non-stenographic means of recording for stenographic means. Under the Rule 31 procedure for depositions on written questions, the attorneys are not present when the witness testifies. Thus, the procedure eliminates attorneys' travel expenses and travel time, though the written deposition itself–preparing and analyzing the questions, cross questions, and redirect questions–will probably take more of the lawyer's time than would be required to question the same witness on an oral deposition.

Use of non-stenographic means of recording depositions under Rule 30(b)(4) eliminates the expense of a stenographic transcript.

Written interrogatories to parties (Rule 33), one of the least expensive discovery devices, can sometimes be substituted for depositions (Rules 30, 31) or records inspection (Rule 34) to reduce expenses. However, any of the foregoing economy measures may reduce significantly the accuracy and usefulness of the information obtained.

Witnesses' expenses. Payments by a party to defray witnesses' expenses (other than the statutory fee, mileage, and per diem), such as the amount paid as a fee to an expert witness in excess of the statutory witness fee or the amount of the witness's lost earnings, ordinarily are not taxable as costs. See *Henkel v. Chicago, St. Paul, M. & O. R. Co.*, 284 U.S. 444 (1932); *United States v. Kolesar*, 313 F.2d 835 (5 Cir. 1963); *Green v. American Tobacco Co.*, 304 F.2d 70 (5 Cir. 1962); *Andresen v. Clear Ridge Aviation*, 9 F.R.D. 50 (D. Neb. 1949); and 6 *Moore's Federal Practice*, ¶ 54.77[5].

Expenses of preparing maps, charts, graphs, photographs, motion pictures and similar materials have been allowed as costs under 28 U.S.C. § 1920(4) in cases where they were shown to be "necessarily obtained for use in the case," but the expenses of preparing models or items illustrative of expert testimony ordinarily have not. *Hope Basket Co. v. Product Advancement Corp., supra*; 6 *Moore's Federal Practice*, ¶ 54.77[6].

Expense of copying documents necessary for use in the case and expense of copying transcripts and court papers may be taxed as costs under 28 U.S.C. § 1920(4). *Advance Business Systems & Supply Co. v. SCM Corp., supra*; *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F .2d 190 (9 Cir. 1964), *cert. denied* 379 U.S. 880 (1964).

C. Expenses Not Paid in Cash or Not Attributable to a Specific Case

Such financial items as overhead salaries that cannot be readily attributed to a specific case ordinarily cannot be claimed as costs. *Advance Business Systems & Supply Co. v. SCM Corporation, supra,* at p. 163.

III. Procedures in Migrants' Cases

A. Proceeding In Forma Pauperis

The Supreme Court has held that a person who makes the affidavit required by 28 U.S.C. § 1915 should be authorized to file suit without prepayment of fees and costs or security therefor. The affidavit should state (1) the nature of the action, (2) the affiant's belief that he is entitled to redress, and (3) that he is unable to pay the costs of the action or give security for them. A person

need not be absolutely destitute in order to have a right to proceed *in forma pauperis*, provided he is unable to pay costs or give security for them and still provide himself and his dependents with the necessities of life. It is not necessary for all plaintiffs to file affidavits in order to entitle one plaintiff to proceed *in forma pauperis*. *Adkins v. E. I. DuPont de Nemours, Inc.*, 335 U.S. 331 (1948).

After a party has been granted leave to proceed *in forma pauperis*, his status remains subject to review throughout the litigation. If the court later finds that the party's financial status has improved sufficiently, the authorization to proceed *in forma pauperis* may be withdrawn. *McClure v. Salvation Army, supra.* If the court finds that the allegation of poverty is untrue, or is satisfied that the action is frivolous or malicious, it may dismiss the case. 28 U.S.C. § 1915(d). See, *e.g.*, *Urbano v. Sondern*, 41 F.R.D. 355 (D. Conn. 1966).

Forms of motion for leave to proceed *in forma pauperis*, an affidavit in support of the motion, and an order authorizing the plaintiff to proceed *in forma pauperis* are set out at the end of this book. In *Adkins v. Dupont, supra*, 335 U.S. at p. 339, the Court held, ". . . where the affidavits are written in the language of the statute it would seem that they should ordinarily be accepted, for trial purposes, particularly where unquestioned and where the judge does not perceive a flagrant misrepresentation." A form of affidavit, simpler than the one shown in this book, would be adequate under the *Adkins* standard, but by including a few additional concrete facts in the affidavit, counsel can acquaint the judge with the case and the circumstances supporting the motion. Since this is the occasion of the first court paper, additional facts in the affidavit can not only persuade the judge of the merits of the motion, but they can begin to persuade him of the merits of the case. The affidavit should state the nature of the action in one sentence, as simple, concise, factual, and non-argumentative as possible. A few more sentences, describing the transitory nature of the plaintiffs' lives, should be included. They will support the motion for leave to proceed *in forma pauperis*, suggest that the case should receive expedited consideration, and lay the groundwork for later motions for protective orders against abusive discovery demands.

If the plaintiff migrant cannot read English and would understand Spanish better than spoken English, an interpreter's declaration should be added to the affidavit. The procedure is as follows: The interpreter should read the complaint and the affidavit to the plaintiff in Spanish, after which the migrant should sign and swear to the affidavit in the presence of a notary public. Finally, the interpreter should sign his declaration.

The motion for leave to proceed *in forma pauperis* and the affidavit in support of it should be presented to a judge, together with an order for his signature, before the complaint is filed. When the judge signs the order it should be filed with the clerk. Counsel for the plaintiff should file the complaint together with any other motions or court papers he has prepared.

B. Recording Deposition Testimony by Non-Stenographic Means

Forms of a notice of motion, a motion under Rule 30(b)(4) for leave to record the testimony at a deposition by other than stenographic means, and an order granting leave to do so are set out at the end of this book. Another approach, which counsel may find effective in obtaining court approval of non-stenographic recording of a deposition, would be to file a motion requesting the court (a) to order the official reporter to attend the deposition and furnish the plaintiff a written transcript without charge, or (b) to order that the testimony at the deposition be recorded by non-stenographic means.

Whichever approach is used, the notice of motion and the motion should be served on each other party with the notice of deposition. Enough time should be allowed in scheduling the

C. Costs

Rule 54(d) does not provide when costs should be taxed. The time is left to the court's discretion. *American Infra-Red Radiant Co. v. Lambert Industries, Inc.*, 41 F.R.D. 161 (D. Minn. 1966). However, costs usually are taxed when a final judgment order is issued. *Parkerson v. Borst*, 256 F. 827 (5 Cir. 1919).

Ordinarily, costs are taxed in favor of the prevailing party. Rule 54(d). However, the district court in its discretion may direct otherwise by apportioning all or part of the costs, by requiring each party to bear its own costs, or by making some other provision. See 6 *Moore's Federal Practice*, ¶ 54.70[5].

When the court is ready to issue a final judgment order, or promptly after it has done so, the prevailing party should file his bill of costs with the clerk. 26 U.S.C. § 1920. Blank bill of cost forms are available at the district court clerk's offices. After the bill is filed, the clerk taxes the costs, allowing those items he determines as proper. He may tax costs on one day's notice. Rule 54(d). His action may be reviewed by the court on motion by any party, which must be served within five days after the costs are taxed. Rule 54(d). The five-day period may be enlarged (Rule 6(b)) on a motion for an extension of time filed within the five days.

A form motion by the prevailing plaintiff to retax costs is set out at the end of this book. It requests an order adding certain items that were not allowed by the clerk. A corresponding motion by the unsuccessful party, seeking review of the clerk's action taxing costs, should request an order striking out certain items which were allowed by the clerk and should specify those items and the reasons why they should not be allowed.

CHAPTER 8

FEDERAL JURISDICTION AND VENUE IN MIGRANTS' CASES

I. Introduction

This chapter deals with federal court subject matter jurisdiction and venue in migrants' cases. "Jurisdiction" is the power to adjudicate. "Venue" designates the place where the judicial authority may be exercised. The most important distinction between the two is that a party may consent to be sued in a district where venue otherwise would be improper; moreover, he waives his objection to venue if he fails to object promptly. A party cannot consent to a court's hearing a case of which it lacks subject matter jurisdiction, and most jurisdiction challenges can be raised at any stage of the proceeding. See Wright, *Federal Courts*, Ch. 7.

II. Federal Jurisdictional Statutes

The United States District Courts are courts of limited jurisdiction, unlike state courts which have plenary or general subject matter jurisdiction. Before suit may be maintained in a federal court, an Act of Congress must authorize federal courts to consider and decide that type of case. However, under the doctrine of pendent jurisdiction, where claims under federal and state law are "derived from a common nucleus of operative fact," a federal court has jurisdiction to decide the state claim in the same case with the federal claim. *United Mine Workers v. Gibbs*, 383 U.S. 715, 721-729 (1966).

Migrants' cases usually will be brought under a substantive statute that confers jurisdiction on federal courts (*e.g.*, Section 16b of the Fair Labor Standards Act, 29 U.S.C.A. § 216(b)) or under one or more of the following jurisdictional statutes that appear in 28 U.S.C. Ch. 85;

§ 1331 Federal question
§ 1332 Diversity of citizenship
§ 1337 Commerce
§ 1343 (3), (4) Civil rights
§ 1346 United States as defendant
§ 1361 Action to compel an officer of the United States to perform his duty

A. Federal Question Jurisdiction

In 28 U.S.C. § 1331, federal question jurisdiction is provided as follows:

> "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

The amount in controversy in most migrants' cases is less than $10,000. Where two or more plaintiffs have separate and distinct claims, the claims may not be added together to arrive at the jurisdictional amount. *Snyder v. Harris*, 394 U.S. 332 (1969); *Hague v. C.I.O.*, 307 U.S. 496, 508

(1939). Accordingly, federal jurisdiction in migrants' cases is more limited under § 1331 than under other jurisdictional statutes.

Nevertheless, punitive damages pleaded in good faith should be taken into account in determining whether the jurisdictional amount is present. Thus, serious disputes between migrants, growers, and crew leaders can be litigated under § 1331 or § 1332 or those sections can be used as alternate bases for subject matter jurisdiction.

The actual amount in controversy may be larger than appears at first glance. In *Rosado v. Wyman,* 304 F. Supp. 1356, 1362-1364 (E.D. N.Y. 1969), *aff'd* 397 U.S. 397 (1970), a suit involving AFDC payments to individual families, palintiffs' counsel were sustained in their claim that the indirect effects of a reduction in welfare benefits could include serious and irreparable mental and physical injuries in which the loss to each family would exceed $10,000.

Further, when each of several plaintiffs claims an interest in the entire amount of a fund totalling more than $10,000, the required jurisdictional amount is present.

B. Diversity of Citizenship

This jurisdiction is provided by 28 U.S.C. § 1332 which states in relevant part:

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between–
>
> (1) citizens of different States;
> (2) citizens of a State, and foreign states or citizens or subjects thereof; and
> (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.
>
> * * *
>
> (c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further,* That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business."

The observations in the preceding section regarding the amount in controversy in suits under 28 U.S.C. § 1331 are also applicable to suits under § 1332. However, the venue provisions relating to diversity cases limit the usefulness of § 1332 even further, as discussed in Section III of this chapter.

C. Commerce

The following is provided by 28 U.S.C. § 1337:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

The statute does not require any minimum amount in controversy. The following substantive statutes relating to migrants' problems are acts of Congress regulating commerce, as shown by their terms, their statement of legislative purpose, or their legislative history:

Wagner-Peyser Act, 29 U.S.C. § 49

Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201-202

Farm Labor Contractor Registration Act, 7 U.S.C. § 2041

Interstate Commerce Act, 49 U.S.C. §§ 303, 304(a) and (3a)

The Fair Labor Standards Act was passed pursuant to exercise of a commerce power, but it has its own jurisdiction provision permitting private suits. 29 U.S.C. A. § 216(b).

All of the foregoing statutes create rights in favor of classes of persons which often include migrants. None of the statutes, other than the FLSA, expressly provides for private remedies. If suits are to be filed under them by migrants, the courts must find an implied private remedy. An implied remedy to enforce the housing code regulations adopted under the Wagner-Peyser Act was found to exist in *Gomez v. Florida State Employment Service,* 417 F.2d 569 (5 Cir. 1969). See Chapter 3, Cases Based on Regulatory Statutes.

D. Civil Rights

Jurisdiction is provided under 28 U.S.C. § 1343 as follows:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;
>
> (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

Of the civil rights statutes that are referred to in § 1343, the four most frequently found to be applicable to migrants' litigation are 42 U.S.C. § 1981, § 1982, § 1983, and § 1985. The first two statutes, § 1981 and § 1982, provide rights for which remedies are found in 42 U.S.C. § 1988 (*Sullivan v. Little Hunting Park,* 396 U.S. 229, 239 (1969).) Each of the other two, § 1983 and § 1985, provides both rights and remedies. A detailed discussion of these statutes is presented in Chapter 9, Private Remedies Under the Nineteenth Century Civil Rights Laws.

The view, which had been expressed by some courts, that jurisdiction under § 1343 was available in cases involving "personal rights" but not in cases involving "property rights" was rejected by the Supreme Court in *Lynch v. Household Finance Corp.*, ___ U.S. ___, 40 LW 4335 (3/23/72).

E. United States as Defendant

Jurisdiction is provided by 28 U.S.C. § 1346 (a) (2), as follows:

> "(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

The doctrine of sovereign immunity holds that the United States may not be sued without its consent. A suit against a federal agency or an individual federal official is a suit against the United States if it seeks to recover federal money or property or if the relief requested would interfere with the government in administering public affairs as authorized by the Constitution and by the laws of the United States. However, a suit to prevent or to remedy injuries caused by a federal official's acting beyond his statutory authority or acting in violation of the Constitution is not barred by the doctrine of sovereign immunity. *Larson v. Domestic and Foreign Corp.*, 337 U.S. 682 (1949); *Malone v. Bowdoin*, 369 U.S. 643 (1962); *Dugan v. Rank*, 372 U.S. 609 (1963); *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309 (1958); *Land v. Dollar*, 330 U.S. 731 (1947).

The Tucker Act, 28 U.S.C. § 1346(a)(2), waives sovereign immunity and allows a limited category of claims against the United States.

F. Action to Compel an Officer of the United States to Perform His Duty

This action is authorized by 28 U.S.C. § 1361, as follows:

> "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

The Mandamus and Venue Act of 1962, 28 U.S.C. § 1361, makes relief against federal officials, which previously had been available only in the United States District Court for the District of Columbia, available in any district court. However, see Byse and Fiocca, "Section 1361 of the Mandamus and Venue Act of 1962 and 'Nonstatutory' Judicial Review of Federal Administrative Action", 81 Harv. L. Rev. 308 (1967), where the authors advise counsel, given the present state of the law, not to rely on § 1361 as the jurisdictional basis for an action to obtain judicial review of a federal official's acts when other bases for federal jurisdiction are present. If § 1361 must be relied on, they suggest, the complaint should request "judicial review", and perhaps declaratory and injunctive relief, "under" or "pursuant to" § 10 of the Administrative Procedure Act, the Declaratory Judgment Act (28 U.S.C. §§ 2201, 2202), and 28 U.S.C. § 1361:

III. Venue

Suit must be filed in a federal district where venue is proper, as stated in 28 U.S.C. § 1391 ("Venue generally"). The venue statute provides that, where jurisdiction is based only on diversity of citizenship, a suit "may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose." However, a suit where jurisdiction is not based solely on diversity "may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law." Because the amount in controversy in most migrants' cases is less than $10,000 (and even where diversity jurisdiction is present, there are also other bases for jurisdiction so the cases are not based "only" on diversity) most migrants' cases that are filed in federal court are filed in the federal district where the claim arose.

Where there are two or more defendants residing in different districts in the same state, suit may be brought in any of those districts. 28 U.S.C. § 1392(a). Where there is only one defendant, a suit filed in his judicial district must ordinarily be brought in the division where he resides. 28 U.S.C. § 1393(a).

An alien may be sued in any district. 28 U.S.C. § 1391(d).

Venue where a corporation is defendant is covered by 28 U.S.C. § 1391(c), as follows:

> "(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

Cases against federal officials are governed by a special venue provision, 28 U.S.C. § 1391(e), which provides as follows:

> "(e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.
>
> The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought."

Although subsection (e) speaks of actions where "each" defendant is an officer, employee, or agency of the United States, the cases have split on the question of whether this special venue provision applies only in suits *exclusively* against federal officials. Compare *Macias v. Finch,* 2 CCH Pov. L. Rep. ¶ 12,233 (N.D. Cal., March 18, 1970) and *Brotherhood of Locomotive Eng'rs. v. Denver & Rio Grande W.R.Co.,* 290 F. Supp. 612 (d. Colo. 1968) (all defendants need not be federal official) with *Town of E. Haven v. Eastern Airlines, Inc.,* 282 F. Supp. 507 (D. Conn. 1968) and *Chase Sav. & Loan Ass'n. v. Federal Home Loan Bank Bd.,* 269 F. Supp. 965 (E.D. Pa. 1967) (all defendants must be federal officials).

Even where subsection (e) is applicable, migrant cases probably will be brought in the judicial district where the claim arose. Nevertheless, subsection (e) remains important in migrant cases because it authorizes delivery of the summons and complaint "beyond the territorial limits of the district in which the action is brought" by certified mail. As such, it constitutes an important exception to the requirement of Rule 4(f) of the Federal Rules that service be made "within the territorial limits of the state in which the district court is held." Subsection (e) thus makes it

possible to bring the Secretary of Health, Education and Welfare, or another federal official, into a suit simply by mailing the summons and complaint to his office in Washington. See, e.g., *Macias v. Finch, supra.* It is important to remember, however, that pursuant to Rule 4(d)(4), (5) of the Federal Rules, a copy of the summons and complaint must also be served on the United States Attorney (or his designee) for the district where the action is brought, and sent by registered or certified mail to the Attorney General in Washington, D. C. (See Nussbaum, *How to Commence Welfare Litigation in a Federal Court,* Center on Social Welfare Policy & Law, New York, pp. 18-20).

A special venue statute, 28 U.S.C. § 1402, covers cases where the United States is a defendant pursuant to 28 U.S.C. § 1346.

IV. Federal Court Doctrines in Avoidance of Decision

Even when a federal court has subject matter jurisdiction over the case, venue is properly laid, and there is personal jurisdiction over all of the defendants, the federal court still may decide not to consider the case if the plaintiff's complaint requests an injunction against state court proceedings or if the plaintiff has failed to exhaust available civil or administrative remedies.

There are four basic doctrines under which a federal court may decline to decide a case over which it has jurisdiction as follows: (1) the equitable doctrine of abstention, (2) the policy enjoining criminal prosecutions in state courts, (3) the doctrine of exhaustion of remedies, and (4) the provisions of the Anti-Injunction Statute, 28 U.S.C. § 2283.

A. The Equitable Doctrine of Abstention

Where (1) a federal court suit attacks a state statute, regulation, or rule of law on constitutional grounds, (2) the meaning of the state law is in doubt, and (3) an interpretation of state law by the state courts might remove the basis for the constitutional attack, the federal court will abstain (though retaining jurisdiction) while the plaintiff returns to state court to obtain an authoritative ruling on the question of state law. *Railroad Commission v. Pullman Co.,* 312 U.S. 496 (1941); *England v. Medical Examiners,* 375 U.S. 411 (1964); *Askew v. Hargrave,* 401 U.S. 476 (1971). However, this doctrine is inapplicable where there is no doubt as to what the state law provides. *Wisconsin v. Constantineau,* 400 U.S. 433 (1971); *Hall v. Garson,* 430 F.2d 430, 436-437 (5 Cir. 1970).

B. The Policy Against Enjoining Prosecutions in State Courts

Federal courts refuse to enjoin criminal prosecutions in state courts, except where the person being prosecuted can show a "great and immediate" danger that the prosecution will cause him irreparable injury and that his federally protected rights are threatened in a way that cannot be eliminated by his defense against a single criminal prosecution. *Younger v. Harris,* 401 U.S. 37, 45-46 (1971); *Byrne v. Karalexis,* 401 U.S. 216 (1971). Earlier exceptions made in *Ex parte Young,* 209 U.S. 123 (1908), and *Dombrowski v. Pfister,* 380 U.S. 479 (1965) were not overturned, but it is doubtful that courts will accord broad construction to them in light of *Younger.*

The policy against enjoining state criminal prosecutions applies to both pending and threatened prosecutions. *Douglas v. City of Jeannette,* 319 U.S. 157 (1943). Moreover, where it would be proper to refuse to enjoin a pending prosecution, the federal court ordinarily should also refuse to issue a declaratory judgment. *Samuels v. Mackell,* 401 U.S. 66 (1971). On the other hand, where a prosecution under a particular state statute has not yet been commenced but is only threatened, it has been held that a federal court may issue a declaratory judgment that the state statute is unconstitutional. *Zwickler v. Koota,* 389 U.S. 241 (1967). (The decision in *Dyson v. Stein,* 401 U.S. 200 (1971), casts some doubt on the rule of the *Zwickler* case. See the dissenting opinion in *Dyson v. Stein* at p. 211).

C. The Doctrine of Exhaustion of Remedies

Federal courts have refused to decide a suit attacking state agency proceedings on constitutional grounds where the agency proceedings were part of a system of regulation involving basic questions of state policy and the plaintiffs had failed to exhaust the administrative remedies provided by state law. *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943). See also *Hosey v. Club Van Cortlandt,* 299 F. Supp. 501, 508, n. 42 (S.D.N.Y. 1969). However, the doctrine of exhaustion of state remedies is inapplicable to cases filed under 42 U.S.C. § 1983 or any other statute intended to provide a federal court remedy that is supplementary to any remedy provided by state law. *McNeese v. Board of Education,* 373 U.S. 668, 672 (1963); *Damico v. California,* 389 U.S. 416 (1967); *Monroe v. Pape,* 365 U.S. 167, 174, 180-183 (1961); *Houghton v Shafer,* 392 U.S. 639 (1968); *Hall v. Garson,* 430 F.2d 430, 434-436 (5 Cir. 1970). The doctrine of exhaustion of state remedies is also inapplicable where the state procedures, as they actually operate, fail to protect the plaintiff's federal rights adequately. *Hillsborough v. Cromwell,* 326 U.S. 620, 625-626 (1946); *McNeese v. Board of Education, supra.*

The courts also apply a similar exhaustion doctrine to proceedings challenging federal statutes which provide administrative remedies. If the issue in court involves a matter which the agency had the authority and procedures to resolve, it must be raised there first.

D. The Anti-Injunction Statute

In 28 U.S.C. § 2283, it is provided as follows:

> "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

It has been held that this statute is not applicable to state court proceedings that are threatened but have not yet commenced. *Dombrowski v. Pfister,* 380 U.S. 479, 484, n. 2; (1965); *McQueen v. Druker,* 317 F. Supp. 1122, 1133 (D. Mass. 1970), *aff'd* 438 F.2d 781 (1 Cir. 1971).

With respect to pending state court proceedings, courts disagree as to whether 42 U.S.C. § 1983 "expressly authorizes" injunctions within the meaning of 28 U.S.C. § 2283. Some cases have held that it does. *Cooper v. Hutchinson,* 184 F.2d 119, 124, n. 11 (3 Cir. 1950); *Honey v. Goodman,* 432 F.2d 333 (6 Cir. 1970); *Sheridan v. Garrison,* 415 F.2d 699 (5 Cir. 1969), *cert. denied,* 396 U.S. 1040 (1970); *Machesky v. Bizzell,* 414 F.2d 282 (5 Cir. 1969); *Tribune Review Publishing Co. v. Thomas,* 153 F. Supp. 486, 490 (W.D. Pa. 1957).

More cases have held that federal court injunctions against pending state court proceedings are not "expressly authorized" by § 1983. *Goss v. Illinois*, 312 F.2d 257 (7 Cir. 1963); *Baines v. City of Danville*, 357 F.2d 756 (4 Cir. 1966), *aff'd.* 384 U.S. 890 (1966); *Respress v. Ferrara*, 321 F. Supp. 675 (S.D.N.Y. 1971); *Stewart v. Dameron*, 321 F. Supp. 886 (E.D. La. 1971); *Sexton v. Berry*, 233 F.2d 220 (6 Cir. 1956); *Wheeler v. Adams Co.*, 322 F. Supp. 645, 653 (D. Md. 1971); *Tyrone, Inc. v. Wilkinson*, 410 F.2d 639 (4 Cir. 1969), *cert. denied*, 396 U.S. 985 (1969).

The Supreme Court has left the question open for future decision. *Cameron v. Johnson*, 390 U.S. 611, 613, n. 3 (1968); *Dombrowski v. Pfister*, 380 U.S. 479, 484 n. 2 (1965); *Younger v. Harris*, 401 U.S. 37, 54, 55 (concurring opinion), 62 (dissent) (1971); *Lynch v. Household Finance Corp.* ___ U.S. ___, 40 LW 4335, 4340 (3/23/72).

Also remaining open for future decision by the Supreme Court is the question whether § 2283 prohibits declaratory judgments in the same circumstances in which it prohibits injunctions. *Younger v. Harris*, 401 U.S. 37, 55 (concurring opinion) (1971); *Respress v. Ferrara*, 321 F. Supp. 675 (S.D.N.Y. 1971). A three-judge court in *Ware v. Nichols*, 266 F. Supp. 564, 569 (N.D. Miss. 1967), a suit filed under 42 U.S.C. § 1983, has held that declaratory judgments are not prohibited by the Anti-Injunction Statute.

CHAPTER 9

PRIVATE REMEDIES UNDER THE NINETEENTH CENTURY CIVIL RIGHTS LAWS

I. Introduction

Four statutes enacted during the decade 1861-1871 create private rights and remedies which may provide migrants with a federal cause of action. The statutes are 42 U.S.C. § 1981, § 1982, § 1983 and § 1985(3). Of the four, § 1983 has been the most useful in migrants' cases. It probably will continue to be the most useful in the near future, at least until interpretations of the other three are forthcoming which are more favorable to the interests of migrants than the language of those three statutes and the case law to date would seem to support.

Sections 1981, 1982, and 1985(3) all appear to require a showing of racial discrimination against the plaintiff, but § 1983 does not. On the other hand, § 1983 requires proof of state action, while § § 1981, 1982, and 1985(3) do not.

In migrants' cases state action can be shown more readily and frequently than racial discrimination. Although migrants are disadvantaged and most of them are members of racial, ethnic, and national minority groups, proof of racial discrimination under the Act requires a comparison between the circumstances of the disadvantaged group (blacks or Chicanos) and the circumstances of a similarly situated favored group of citizens (whites or Anglos). There is no favored group that is similarly situated to migrants. All migrants are disadvantaged in most important respects, regardless of their race, color, or national origin. Although, for example, the year-round white residents in a rural Michigan town fare better than the black and Chicano migrants who come there to harvest crops two weeks each year, the difference in their circumstances usually can be attributed as much to the white persons' being year-round residents and the migrants' being transitory as it can be attributed to a difference in race.

By contrast, many of the contacts that migrants have with the rest of the world are contacts with state and local government agencies and officials (such as police officers and employees of welfare departments, health departments, school systems, and employment services). Many, if not most, cases of retaliation or denial of access to labor camps and cases arising out of regulatory statutes or benefit programs involve state action of the sort required by 42 U.S.C. § 1983.

The follwing is a brief summary of the law under each of the four statutes.

II. Equal Rights Under the Law 42 U.S.C. § 1981

Section 1981, adopted in 1866, provides as follows:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Section 1981 was enacted to implement the Thirteenth Amendment. After years of disuse, it was given new life by a footnote in the opinion in *Jones v. Mayer*, 392 U.S. 409, fn. 78 at pp. 441-442 (1968). See also *Mizell v. North Broward Hospital Dist.*, 427 F.2d 468 (5 Cir. 1970). The

Act guarantees to all persons the same rights as white citizens in the respects mentioned, including private employment and every other sort of transaction involving contracts. *Young v. International Telephone & Telegraph Co.*, 438 F.2d 757 (3 Cir. 1971); *Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011 (5 Cir. 1971); *Sanders v. Dobbs Houses Inc.*, 431 F.2d 1097 (5 Cir. 1970), *cert. denied* 401 U.S. 948 (1970); *Waters v. Wisconsin Steel Works of International Harvester Co.*, 427 F.2d 476 (7 Cir. 1970), *cert. denied* 400 U.S. 911 (1970); *State of Washington v. Baugh Construction*, 313 F. Supp. 598 (W.D. Wash. 1969); *Central Contractors Ass'n. v. Local 46 IBEW*, 312 F. Supp. 1388 (W.D. Wash. 1969); *Dobbins v. Local 212 IBEW*, 292 F. Supp. 413 (S.D. Ohio 1968); *Jackson v. Wheatley School Dist. No. 28*, 430 F.2d 1359 (8 Cir. 1970); *Scott v. Young*, 421 F.2d 143 (4 Cir. 1970), *cert. denied* 398 U.S. 929 (1970). See Larson, "42 U.S.C. Section 1981 as a Remedy for Racial Discrimination in Employment," 4 Clearinghouse Rev. 572 (April 1971).

To obtain relief under the statute the plaintiff must allege and prove the following propositions:

1. The defendant (a) denied the plaintiff the enjoyment of one of the rights enumerated in the statute on the same basis as white citizens enjoy it; or (b) subjected the plaintiff to a punishment, pain, penalty, tax, license, or exaction of any kind on a basis different from white citizens; and
2. The plaintiff was injured as a result of the denial.

The opinion in *Jones v. Mayer* suggests that the cause of action may be limited to cases where racial discrimination can be proved. It also holds that state action is not required for a cause of action under § 1981. Sections 1981 or 1982 may be applicable, for example, where students or other local white residents work in agriculture during the same season as migrants but are given better jobs (for which the migrants are equally qualified), better fields, more work, or better housing or transportation.

The remedy statute for violations of § 1981 is 42 U.S.C. § 1988. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1970); *Mizell v. North Broward, supra*, 427 F.2d at p. 472. Federal courts have jurisdiction of suits under § 1981, by virtue of 28 U.S.C. § 1343(4).

III. Property Rights of Citizens 42 U.S.C.§ 1982

Section 1982, enacted in 1866, provides as follows:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

To obtain relief under this statute the plaintiff must allege and prove that:

1. The defendant denied the plaintiff the enjoyment of the right to inherit, purchase, lease, sell, hold, or convey real or personal property on the same basis as white citizens enjoy it; and
2. Plaintiff was injured as a result of the denial.

See *Jones v. Mayer, supra*, and *Sullivan v. Little Hunting Park, Inc., supra*. Further, white plaintiffs who were subjected to harassment because they had black guests have recovered under 42 U.S.C. § 1982. *Walker v. Pointer*, 304 F. Supp. 56 (N.D. Tex. 1969).

Future interpretations of the statute may limit it to only those cases where racial discrimination can be shown. State action is not required to be proved in a case under § 1982. *Jones v. Mayer, supra*. Under this statute or 42 U.S.C. § 1981, or both, migrants should be able to obtain relief

from private racial discrimination in housing based on their status as tenants, occupants, or applicants for housing.

The statutory remedy for violations of § 1982 rights is found in 42 U.S.C. § 1988. *Sullivan v. Little Hunting Park, Inc., supra,* at pp. 238-239. *Jones v. Mayer, supra,* at p. 414, n. 13. Federal courts have jurisdiction of suits brought under § 1982 by virtue of 28 U.S.C. § 1343 (4).

IV. Civil Actions for Deprivation of Rights. 42 U.S.C. § 1983

Section 1983, enacted in 1871, provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

To obtain relief under § 1983 the plaintiff must allege and prove the following propositions:

1. The defendant subjected him, or caused him to be subjected, to the deprivation of any of the rights, privileges, or immunities secured by the Constitution and laws of the United States.
2. The plaintiff was injured as a result of the deprivation.
3. The deprivation was "under color of" law.

The cases have held that action under color of law is present in the following situations:

1. Where the prohibited action is taken by a state official with or without authority, is required by a state statute or regulation or by a local ordinance, or is sought to be enforced in a state court. *Shelley v. Kraemer,* 334 U.S. 1 (1948); *Barrows v. Jackson,* 346 U.S. 249 (1953); *N.Y. Times Co. v. Sullivan,* 376 U.S. 254, 265 (1964); *Edwards v. Habib,* 397 F.2d 687, 691-696 (D.C. Cir. 1968). State action is present even in the action of a state court applying the state's common law to a private lawsuit. *N.Y. Times v. Sullivan, supra.*

2. Where the prohibited action is taken by a person or entity so closely involved with the state government as to become "interdependent" with it. *McQueen v. Druker,* 317 F. Supp. 1122 (D. Mass. 1970) *aff'd* 438 F.2d 781 (1 Cir. 1971); *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961); *Ethridge v. Rhodes,* 268 F. Supp. 83, 87-88 (S.D. Ohio 1967).

3. Where a private person engages jointly with state officials to take the prohibited action. *Adickes v. Kress & Co.,* 398 U.S. 144, 150-152 (1970); *United States v. Price,* 383 U.S. 787 (1966); *Gomez v. Florida State Employment Service,* 417 F.2d 569 (5 Cir. 1969).

4. Where a private person acts in a prohibited way because of a state-enforced custom. Such a custom must have the force of law by virtue of persistent and well-settled practices of state officials. A custom can be given the force of law, for example, by police harassing persons who violate the custom or by police intentionally tolerating private violence or threats of violence against persons who violated it. *Adickes v. Kress & Co., supra,* at pp. 162-171.

Two leading § 1983 cases, in addition to those mentioned above, are *Monroe v. Pape,* 365 U.S. 167 (1961), and *McNeese v. Board of Education,* 373 U.S. 668 (1963). The only published § 1983 migrant cases are *Gomez v. Florida State Employment Service, supra,* and *Folgueras v. Hassle,* 331 F. Supp. 615 (W.D. Mich. 1971), where migrants and visitors to a labor camp recovered damages from a grower who was assisted by the local police in evicting the visitors and arresting them.

Section 1983 contains its own remedy provision. Federal courts have jurisdiction of § 1983 cases under 28 U.S.C. § 1343(3), (4).

V. Conspiracy To Interfere With Civil Rights 42 U.S.C. § 1985(3)

Subsection 1985(3), adopted in 1871, provides as follows:

> "(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitiled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

To recover under 42 U.S.C. § 1985(3) the plaintiff must allege and prove the following four propositions:

1. Two or more persons conspired.
2. The conspiracy had the "purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws; or . . . the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws."
3. At least one conspirator commited an act in furtherance of the object of the conspiracy.
4. A person was "injured in his person or property or deprived of having and exercising any right or privilege of a citizen of the United States."

In the recent landmark case interpreting § 1985, *Griffin v. Breckenridge*, 403 U.S. 88 (1971), the Supreme Court characterized the motive that must be proved as "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." *Griffin* also held that state action is not necessary for a conspiracy to be actionable under § 1985.

The statute contains its own remedy provision. Federal courts have jurisdiction of § 1985 cases by virtue of 28 U.S.C. § 1343.

CHAPTER 10

CLASS ACTION PRACTICE

I. Introduction

Many employers, landlords, government officials, police, merchants, and others who come in contact with migrants treat them more as a class than as individuals. Accordingly, class actions under Rule 23 of the Federal Rules of Civil Procedure are available in many migrants' cases.

A. Advantages and Disadvantages of Class Action Procedure

Class action procedure can have two main advantages in migrants' cases:

1. It can enable migrants to enforce the rights they have in common with others when they are too poor to enforce their rights individually through separate lawsuits.

2. It can demonstrate to the migrants in a class of plaintiffs that they have enforceable legal rights. Filing suit as a group can protect the individual members of the group against retaliation and harassment.

Class action procedure imposes additional responsibilities on the named plaintiff, some of which may be disadvantages.

1. The representative plaintiff has a responsibility to represent the interests of the absent members of the class in good faith and energetically. The most important characteristic of class suits is that one person is acting on behalf of others.

2. The plaintiff who claims to represent a class reduces his own flexibility in two important respects, as follows: (a) Once the complaint is filed, he may not dismiss the class aspect of the suit or strike or withdraw from the complaint the allegations of class representation without first notifying the absent members of the class; and (b) once the complaint is filed, he may not settle or compromise the case with any of the defendants without notifying the absent members of the class and obtaining court approval of the settlement.

3. Class action procedure under Rule 23 usually requires that notices be sent to the absent members of the class on one or two occasions. The expense and the extra work of locating the absent members and issuing the notices usually must be borne by the representative plaintiff.

4. In addition to the notice requirements, class action involves other extra procedural steps, including a determination by the court whether the case should be maintained as a class action.

5. The defendants may complicate the case by pursuing extensive discovery on the preliminary question whether the suit should be maintained as a class action. After that determination is made, the defendants may seek discovery on the claims and interests of the various members of the class, including all of the absent members.

6. Where members of the class claim damages, their claims probably will have to be processed individually after the defendant's liability is established. This processing will require extra time and attention by the plaintiffs' attorney. Counsel's task can become complicated where the defendant offers to settle the claims of only a part of the class, or where an offer is made to all of the class but only some of them are willing to accept it.

Thus, counsel for the plaintiffs should consider carefully the objectives of the litigation and whether the advantages of class action procedure will justify the added responsibilities and complexities. The answer will depend on the facts of the particular case. To take one example, the problems of determining the identity of the occupants of a labor camp on a given date and maintaining

contact with them throughout the litigation are simpler where all of them were members of the same crew, recruited by a single crew leader from the same locality in Texas, than where they were free lance workers from several states.

B. Alternatives to Class Action Procedure

In some circumstances the same legal results might be obtained without the use of class action procedure. The three main alternatives are test cases, suits for changes in regular administrative practices, and suits by organizations as plaintiffs.

A test case brought by one or more individuals can establish a rule of law having general applicability in favor of all migrants. If it is obeyed as a general rule thereafter by the growers, crew leaders, landlords, government officials, or other persons who are subject to the rule, and if the migrants who were not formally represented in the test case become aware of their rights as established by that case and begin to exercise them, then the result can be the same as if a class action had been brought successfully.

A single plaintiff can sometimes obtain relief that will benefit all persons similarly situated in the future, where the relief is an injunction requiring changes in the regular standards or procedures used in an administration, by government benefit program personnel, by government enforcement officials, or by growers, employers, landlords, or other businessmen.

A membership organization may litigate to protect the interests of its members. *Sierra Club v. Morton*, ____ U.S. ____, 40 Law Week 4397 (4/18/72); *Norwalk CORE v. Norwalk Development Agency*, 395 F.2d 920, 937 (2 Cir. 1968). In such a case the constitutional requirements stated in *Hansberry v. Lee*, 311 U.S. 32 (1940), would have to be met. That is, the interests of the absent persons would have to be "of the same class" as the interests of the organization, not in conflict; the absent persons would have to be adequately represented by the organization; and the litigation would have to be conducted so as to insure the full and fair consideration of the issue common to the organization and the absent persons. The cases decided so far do not suggest that the organization plaintiff must comply with all of the formal procedural requirements as for class representation under Rule 23.

II. Essentials of Class Actions in Migrants' Cases

Every class action must have the four prerequisites stated in Rule 23(a) and also must fall into one or more of the classifications described in Rule 23(b). Because the three types of class actions outlined in Rule 23(b) relate to the initial definition of the class, they are discussed here first, before the discussion of prerequisites under Rule 23(a).

A. Types of Class Actions

Rule 23(b) provides as follows:

> "(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

There must be a class. The class must be capable of being described precisely, though it may be impossible to determine the identity of all of the members. *Carpenter v. Davis*, 424 F.2d 257 (5 Cir. 1970). A class of "people with Spanish surnames, Mexican, Indian, and Spanish ancestry, speaking Spanish as a primary language," was held too vague to describe a class under Rule 23 in *Tijerina v. Henry*, 48 F.R.D. 274 (D.N.M. 1969), *appeal dism.* 398 U.S. 922 (1970). But a class consisting of "all persons whose poverty or lack of apparent means of livelihood render them susceptible to arrest under state vagrancy laws" was upheld in *Broughton v. Brewer*, 298 F. Supp. 260, 267 (N.D. Ala. 1969).

Counsel for the plaintiff should define the class so as to bring it within the description of one of the three types of class actions specified in Rule 23(b).

Type(b)(1) class actions. Class action type (b)(1) is intended to avoid the risks that separate adjudications would involve to the individual members of the class or to the party opposing the class. An example might be a suit by a migrant assistance organization against all owners and operators of migrant labor camps in a designated county for an injunction against interfering with access to the camps. (See Section IV of this chapter.)

Type (b)(2) class actions. Class action type (b)(2) should usually be applicable to migrants' cases because most potential defendants treat migrant farmworkers and their families in the same way and without distinctions among members of the group. Specifically, type (b)(2) actions should be appropriate in the following situations:

1. A suit on behalf of all occupants of a labor camp and on behalf of a described class of visitors against a defendant who has excluded someone (such as a Title III-B program outreach worker, a legal services attorney, or a priest) who intended to visit most or all of the occupants of the camp, or who has generally excluded or threatened to exclude visitors in such a way as to establish a restriction which is applicable to the whole camp.

2. A suit on behalf of a designated class to remedy retaliatory firing or eviction or other retaliation, where the defendant has threatened reprisals against all the members of the class, or where the defendant has retaliated against one or two persons in such a way as to threaten the rest.

3. Actions under regulatory statutes—for example, a suit by all occupants of the defendant's migrant labor camps under the Wagner-Peyser Act to enforce the housing code and the other provisions of the law against violations that affect the entire class.

4. A suit by a designated group of intended beneficiaries, challenging the standards and procedures provided by the laws creating the benefit program or applied by the officials administering the program, where those practices affect the members of the class in the same way.

Type (b)(3) class actions. Class action type (b)(3) is intended for those situations where questions of law or fact common to the class predominate and warrant class handling. Actions under (b)(3) are especially appropriate where there is a common question of liability but all of the members of the class have individual damage claims in varying amounts. Contract suits against employers, crew leaders, and others with whom migrants have contracts, where they can be maintained as class actions, probably will fit this category more readily than either of the others.

Relationship between the categories. The three basic types of class actions overlap. Many actions of types (b)(1) and (b)(2) also fit type (b)(3). Where there is a choice, type (b)(1) or (b)(2) should be preferred to type (b)(3) because the procedural requirements of type (b)(3) actions are more extensive and the judgment in a (b)(3) action will not bind absent members of the class who exercise the option provided by section (c)(2) of the Rule. *Mungin v. Florida East Coast Ry. Co.*, 318 F. Supp. 720, 730-731 (M.D. Fla. 1970), *aff'd* 441 F.2d 728 (5 Cir. 1971). 3B *Moore's Federal Practice*, ¶ 23.31 (1) and 23.45.

Types (b)(1) and (b)(2) are intended to be used in cases where an injunction or declaratory relief is the predominant form of relief souught, though damages may be obtained in those cases also, *Rodriguez v. Swank*, 318 F. Supp. 289, 295 (N.D. Ill. 1970), *aff'd* 403 U.S. 901 (1971). Type (b)(3) is available in cases where the rights of the class depend on the determination of common issues. Different members of the class in a (b)(3) case may obtain different relief, for example, where the basic claim is for damages sustained by the individual members of the class.

B. Prerequisites

Rule 23(a) provides as follows:

> "(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

The class is so numerous that joinder of all members is impracticable. There is no general numerical standard for determining whether a class meets this requirement. The court should consider the number of members in the class and the inconvenience in bringing them before the court. A group whose members are widely scattered and whose individual interests are small should not be required to produce as many members to qualify as a class under Rule 23 as other groups. *Swanson v. American Consumer Industries, Inc.*, 415 F.2d 1326, 1339 n. 9 (7 Cir. 1969); 3B *Moore's Federal Practice*, ¶ 23.05. Classes consisting of 35 and 40 members were upheld in *Fidelis Corp. v. Litton Industries, Inc.*, 293 F. Supp. 164, 170 (S.D.N.Y. 1968) and *Citizens Banking Corp. v. Monticello State Bank*, 143 F.2d 261, 264-265 (8 Cir. 1944).

There are questions of law or fact common to the class. This prerequisite should be present in any case that falls into one of the three types of class action described in subsection (b). Examples

of common questions are whether racial discrimination was practiced and whether government officials followed the law in administering a program that affects many persons. 3B *Moore's Federal Practice*, ¶ 23.06-1.

The claims or defenses of the representative parties are typical of the claims or defenses of the class. It has been said that there is no need for this clause of Rule 23, since all meanings attributable to it duplicate requirements prescribed by other provisions of the rule. *Rosado v. Wyman*, 322 F. Supp. 1173, 1193 (E.D.N.Y. 1970), *aff'd* 437 F.2d 619 (2 Cir. 1970). 3B *Moore's Federal Practice*, ¶ 23.06-2. The representative party must be a member of the class, but, even if he as an individual obtains relief that is not offered to other members of the class, his claim does not become untypical and the case does not become moot. *Jenkins v. United Gas Corp.*, 400 F.2d 28 (5 Cir. 1968).

The representative parties will fairly and adequately protect the interests of the class. The adequacy of the representation does not depend on the merits of the representative plaintiff's own individual case. *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124 (5 Cir. 1969). In determining the adequacy of the representation, the court should consider the following factors (3B *Moore's Federal Practice*, ¶ 23.07):

1. Whether the representative plaintiff's interests and the interests of the other members of the class have some common element of fact or law. *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562-563 (2 Cir. 1968).
2. Whether the representative's interests are antagonistic to the interests of those he represents. *Hansberry v. Lee*, 311 U.S. 32 (1940).
3. The proportion of the number of representative parties to the total membership of the class. However, in the *Eisen* case it was held that one plaintiff could represent a class of millions adequately for purposes of Rule 23. In *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968), it was held that four plaintiffs could represent 200,000.
4. Any other facts bearing on the representative's ability to speak for the class, including the qualifications and diligence of his counsel. *Eisen v. Carlisle & Jacquelin, supra*, 391 F.2d at 562-563.

The fact that some members of the class are satisfied with the practices complained of in the lawsuit does not defeat a class action. *Norwalk CORE v. Norwalk Development Agency, supra*, 395 F.2d at 937. Members of the class may regard the plaintiffs as troublemakers for starting a court fight against a grower or crew leader upon whom they all depend for their livelihood. The experience of private and legal services lawyers in migrants' cases to date does not suggest that class members are likely to complain to the court that they are dissatisfied with the representative; but the chance that the defendant, particularly an employer, may stir up such opposition should be considered carefully. *Hess v. Anderson, Clayton & Co.*, 20 FRD 466 (S.D. Cal. 1957).

III. Class Action Procedure in Migrants' Cases

A. Plaintiff's Complaint

Jurisdiction. The basis of jurisdiction must be alleged, as in other cases. (See Chapters 8 and 11.) Rule 23 does not confer jurisdiction in cases where it is otherwise absent. Where jurisdiction is based on 28 U.S.C. § 1331 (federal question) or § 1332 (diversity of citizenship), requiring that

the matter in controversy exceed $10,000, and where the plaintiffs have separate and distinct claims, the claims may not be added together to arrive at the jurisdictional amount. *Snyder v. Harris,* 394 U.S. 332 (1969).

Class action. The complaint in a separate paragraph should identify the case as a class action, recite that the four prerequisites required by Rule 23(a) are present, and identify the type of class action under Rule 23(b). The following is an example:

> Plaintiffs sue in their own behalf and, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all of the occupants of the defendant's migrant labor camps in Van Buren County, Michigan. The class is so numerous that joinder of all members is impracticable. There are questions of law and fact common to the class. The claims of the plaintiffs are typical of the claims of the class. The plaintiffs will fairly and adequately protect the interests of the class. The defendant has acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

The other allegations of the complaint must contain facts that support the recitals in the foregoing paragraph.

B. Court's Order Determining Whether a Class Action Is To Be Maintained

Rule 23(c)(1) requires the court to determine by an order whether the case is to proceed as a class action. In making the order the court also should define the class. The determination whether a case is to proceed as a class action is mandatory. In *Dorfmann v. Boozer,* 414 F.2d 1168 (D.C. Cir. 1968), an injunction issued against all members of a tenants council, without a finding by the court that the tenants council was a class and that the defendants represented that class, was held invalid.

In class actions of the (b)(3) type, Rule 23(b)(3) requires the court to make two findings: "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The rule then enumerates four matters that are pertinent to the findings. (The findings required by Rule (b)(3) are not required in (b)(1) or (b)(2) type cases.)

Findings required under Rule 23(b)(3) are as follows:

1. Common questions of law or fact predominate. No standards have been developed for deciding whether common questions predominate. The issue must be argued and decided on the basis of the facts of each case. However, there are cases where common questions make class action handling almost necessary. For example, in some cases each of several plaintiffs can prove liability on the part of the defendant only by showing that he pursued a pattern of conduct that involved them all. In such cases some of the necessary evidence might be inadmissible or otherwise not available if a class action were not allowed. *Green v. Wolf Corp.,* 406 F.2d 291, 300 (2 Cir. 1968); *Contract Buyers' League v. F & F Investment Co.,* 300 F. Supp. 210, 213-214 (N.D. Ill. 1969), *aff'd Baker v. F & F Investment,* 420 F .2d 1191 (7 Cir. 1970), *cert. denied* 400 U.S. 821 (1970).

2. Class action is superior to other available methods. In deciding this question, the court should consider both efficiency and fairness. If suit was filed during the limitations period and the statute of limitations has run before the court makes it finding, fairness would favor allowing the class action so none of the absent members would be penalized for relying on the class suit to represent their interests.

Class action procedure may enable plaintiffs to sue to enforce a statutory right in circumstances where the statute might otherwise not be enforced. In such cases the court should find that a class action is superior to other methods in order to effectuate the purpose of the statute in question. 3B *Moore's Federal Practice*, ¶ 12.45(3).

Timing of the court's determination under Rule 23(c). The rule requires the determination to be made "as soon as practicable" after the commencement of the action. In migrants' cases, where the members of the class are due to leave the jurisdiction soon after suit is filed, counsel should obtain the court's determination under Rule 23(c) on an expedited basis so any notice that may be required can be given to the class before they leave. The order should specify the type of notice to be given and who should pay for it.

C. Notice to the Class

Rule 23(c)(2) requires notice to be sent to the members of the class that the case is proceeding as a class action.

Which cases require notice? Rule 23(c)(2) makes notice mandatory in all type (b)(3) class actions. Whether notice is required in other class actions is not settled. The court in *Eisen v. Carlisle and Jacquelin, supra,* stated that due process requires notice to the class in type (b)(1) and type (b)(2) cases. The courts in *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5 Cir. 1969); *Mungin v. Florida East Coast Ry. Co., supra,* 318 F. Supp. at 732; and *Northern Natural Gas Co. v. Grounds,* 292 F. Supp. 619, 636 (D. Kan. 1968) and the author of *Moore's Federal Practice* disagree. Moore, in 3B ¶ 23.55, argues that notice should not be required in a (b)(1) or (b)(2) case which is well publicized, where notice would add little or nothing, and where the representative parties are truly representative of the class.

Counsel for migrants should be in favor of notice to the class, unless it is too expensive or unless the message approved by the court is offensive to the interests of the class. At the very least, notice will publicize the lawsuit, acquaint the absent members of the class with the fact that rights (of which they may have been unaware) are being asserted on their behalf, and encourage them to regard themselves as persons having enforceable rights.

When should notice be given? The rule does not provide the timing of the notice to the class. As mentioned above, in all migrants' cases where possible, any notice required should be given to the migrant members of the class before they leave the jurisdiction in order to allow them to assert conveniently and promptly any rights they may have with respect to the litigation and to reduce the expense of giving notice.

Who gives the notice? Rule 23(c) provides that "the court shall direct" the notice to the class. Some courts allow or require plaintiff's counsel to perform ministerial tasks in connection with the notice under the court's supervision and control.

How is notice to be given? Rule 23(c)(2) requires that notice in type (b)(3) cases be "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." The notice does not have to meet the requirements of original process. Some courts, recognizing that the expense of first class mail would be prohibitive, have ordered notice to be given through coverage in the news media or by publication. *Johnson v. Robinson,* 296 F. Supp. 1165, 1169 (N.D. Ill. 1969), *aff'd* 394 U.S. 847 (1969); *State of West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1090-1091 (2 Cir. 1971); *Eisen v. Carlisle and Jacquelin,* 52 F.R.D. 253 (S.D.N.Y. 1971). In most cases where the class consists of a group of migrants living in a labor camp, hand delivery of the notice to members of the class by a representative of the plaintiff or a neutral third party probably would be more effective and less expensive

than notice by mail or publication. Where notice is to be given after the migrants in the class have left the jurisdiction, publication in a home base newspaper may be the most effective, economical way to reach them.

What should the notice provide? The contents of a notice in a type (b)(3) class action are set out in Rule 23(c)(2). In those cases and in any type (b)(1) and type (b)(2) cases where notice is required, the notice at a minimum should contain the following information:

1. The name of the court and the judge where the lawsuit is pending,
2. The names of the parties,
3. The fact that the case is a class action and the description of the class,
4. The claims being made by the plaintiff on behalf of the class and the relief requested,
5. That any member of the class may enter his appearance in the suit, if he desires, and
6. Any other matters that should be called to the attention of the absent members.

In migrants' cases the notice should be written in Spanish (if that is the language usually spoken by any of the members of the class), as well as in English.

Who pays for the notice? The plaintiff usually pays; but in *Dolgow v. Anderson,* 43 F.R.D. 472 (E.D.N.Y. 1968) and in *Eisen v. Carlisle and Jacquelin,* 52 F.R.D. 253, *supra,* the courts considered that notice could be given at the expense of the court or the defendant.

The fact that a plaintiff is proceeding *in forma pauperis* probably will not be sufficient to entitle him to have the financial expense of notice borne by others (see Chapter 8, Section II B). However, in most cases counsel should argue that the plaintiff's poverty, together with the likelihood that he will prevail on the merits, justify the court's shifting to the defendants the financial burden of notice to the plaintiff class.

D. Dismissal or Compromise

Rule 23(e) provides as follows:

> "(e) *Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

When the complaint alleges a class action, the suit is treated as a class action from the time of filing. *Torres v. N. Y. State Dept. of Labor,* 318 F. Supp. 1313, 1317 (S.D.N.Y. 1970). Settlement by the representative plaintiff and some of the defendants after suit is filed cannot be approved by the court until after the class is determined under Rule 23(c)(1) and notice is given. *Philadelphia Electric Co. v. Anaconda American Brass Co.,* 42 F.R.D. 324, 326 (E.D. Pa. 1967).

IV. Action Against a Class of Defendants

The language of Rule 23 makes clear that actions may be maintained against classes of defendants as well as on behalf of classes of plaintiffs, if all of the prerequisites of Rule 23(a) are satisfied and the case comes within one of the categories described in 23(b). So far, class actions against defendants have been used sparingly, but they have been upheld. In *Hadnott v. Amos,* 295 F. Supp. 1003, 1005 (M.D. Ala. 1968), 325 F. Supp. 777 (M.D. Ala. 1971), and *In re Herndon,* 325 F. Supp. 779 (M.D. Ala. 1971), a member of a class of defendants (not a named defendant) was held guilty of civil and criminal contempt for violating an order issued against the class, of which he had actual knowledge. (For related contempt proceedings against the same person in the same case in the Supreme Court of the United States see *Hadnott v. Amos,* 394 U.S. 358 (1969) and *In re Herndon,* 394 U.S. 399 (1969).)

PART III

PROCEDURE

CHAPTER 11

PREPARING AND FILING A COMPLAINT

I. When Suit Should Be Filed

In most migrants' cases, especially those arising out of retaliatory firing or eviction or denial of access to a migrant labor camp, suit must be filed immediately to prevent threatened injury or to stop harmful conduct that is occurring already. Where suit may be delayed, such as in some contract claims, it is important for counsel to observe the applicable state statute of limitations and file suit, if at all, before the limitations period elapses.

The following steps should be taken before filing a complaint:

1. Obtain enough reliable facts to draft a complaint.
2. Determine what relief is necessary and appropriate.
3. Decide where suit should be filed.

II. Where Suit Should Be Filed

Many migrants' cases have contacts with several states and with different counties and federal judicial districts within a state. For example, claims by migrants living in Hidalgo County, Texas, against a grower in Muskegon County, Michigan, and a crew leader residing in San Antonio (Bexar County), Texas, who transported the migrants from their homes to the grower's farm, have contacts with the following jurisdictions:

Home base state: Texas
State court, Hidalgo County
State court, Bexar County
Federal court, Southern District of Texas
Federal court, Western District of Texas

Stream state: Michigan
State court, Muskegon County
Federal court, Western District of Michigan

Suit may be filed in any court having jurisdiction to decide the type of case in question, where jurisdiction can be obtained over all of the defendants, and where venue is proper.

A. Subject Matter Jurisdiction

State courts have general subject matter jurisdiction. Federal courts have limited jurisdiction; that is, they may handle only certain kinds of cases, as provided by Act of Congress.

B. Jurisdiction Over the Defendants

The court serves process on the defendants in order to notify them of the lawsuit and to obtain power to issue orders against them. The manner in which each court may serve process on defendants is limited by constitutional requirements of due process.

C. Establishing Venue

Rules regarding venue designate one or more courts where a case may be heard.

State court subject matter jurisdiction, the manner in which state courts may obtain jurisdiction over defendants, and venue in state courts are covered by the law of the state in question. Federal court jurisdiction and venue are discussed in Chapter 8 and service of process, in Chapter 12.

Where there are two or more courts which have jurisdiction, which can obtain service of summons on all defendants, and in which venue would be proper, suit should be filed in the court that has the best combination of the following features:

1. Judges and jurors who are likely to be sympathetic to the migrants' claim.
2. Court policy of broad pretrial discovery and rules and procedures that will assist the preparation and successful outcome of the migrants' case.
3. A location convenient to the migrants, their witnesses, their counsel, and any records that may be required by the case.

In making the decision, it should be borne in mind that under 28 U.S.C. § 1441(b) any civil action of which the district courts have original jurisdiction, founded on a claim or right arising under the Constitution, treaties, or laws of the United States, is removable to federal district court without regard to the citizenship or residence of the parties; and any other such action is removable unless one or more of the defendants is a citizen of the state in which the action is brought.

Counsel may choose to file separate suits against two or more defendants in different courts, where advantageous.

III. Drafting A Complaint

A complaint in federal court should have the following parts: a caption; an introductory or preliminary paragraph that sets out the nature of the action; a statement of the grounds on which the court's jurisdiction depends; identification of the plaintiffs; identification of the defendants; a statement of facts, showing that each of the defendants owed a duty to one or more of the plaintiffs and that the defendants breached their duty to the plaintiffs; allegations supporting equitable relief, where equitable relief is to be requested; a prayer for relief; and signature.

A. Caption

Rule 10(a) of the Federal Rules of Civil Procedure covers the form of pleadings. It requires that the complaint set forth the name of the court, the title of the action, including the names of all of the parties, the file number, and a designation that the pleading is a complaint. The local rules of some courts have additional requirements—for example, that the caption of the complaint show the address, as well as the name, of each party.

The order in which the parties are named in the caption can be important. In many jurisdictions the parties will be called upon to present evidence at the trial in the order in which they are named in the caption, an order which the plaintiff's counsel controls by the way he drafts the complaint. Thus, after the last-named plaintiff has rested his case the first-named defendant will proceed to offer evidence, followed by the second-named defendant, and so on. Counsel for the migrants should name the parties in the caption in the order that will be most advantageous at the trial, unless there is a good reason for arranging them in some other order.

B. Introductory Paragraph

Although not required by the rules of pleading, an introduction or a preliminary paragraph, concisely characterizing the lawsuit, makes the complaint more persuasive. For example, the following might be an appropriate introductory paragraph for a complaint in an access case:

> "This is an action by migrant workers and their families, and by employees of a migrant assistance program, to enjoin the defendant grower from interfering with persons seeking to enter his migrant labor camps to visit the persons living there. The suit also requests declaratory relief, pursuant to 28 U.S.C. §§ 2201 and 2202, and damages."

The rest of the complaint should support this preliminary statement, and the whole complaint should tell a connected story.

C. Jurisdiction

Rule 8(a), covering general rules of pleading, requires complaints filed in federal court to contain a short and plain statement of the grounds on which federal jurisdiction depends. An example of a jurisdictional statement in a case of denial of access or retaliatory eviction from a labor camp, where the local police assisted the grower in violation of 42 U.S.C. § 1983, is as follows: "This court has jurisdiction of this case by virtue of 28 U.S.C. § 1343(3), (4)."

D. Identification of the Plaintiffs

Each party, plaintiff or defendant, should be identified and characterized accurately. Where the case is brought as a class action, the elements of a class action under Rule 23(a), (b) should be alleged. (See Chapter 10, Class Action Practice.)

Rule 17 covers parties' capacity to sue or be sued. The capacity of an individual, such as a child, to sue is determined by the laws of his domicile. If he is not competent to sue in his own name and he does not have a duly appointed guardian or other representative, he may sue by his next friend or by a guardian ad litem, and reference to that fact should be made. However, under Rule 9(a) it is not necessary to allege that he or his representative has capacity to sue.

Rules 18-21, on joinder of parties and joinder of claims and remedies, should be consulted whenever the facts of the case raise any of the following questions: (1) whether a potential party should be included in the lawsuit or should be omitted from it; (2) whether a potential party should be included as a plaintiff or as a defendant; (3) whether all of the potential claims against a defendant should be included in the lawsuit or whether one or more of those claims should be omitted from the case.

E. Identification of the Defendants

The defendants may include any person or firm who has the power and authority to accomplish the relief the migrants need and against whom the migrants have a cause of action. Usually the defendants will include the person or persons whose acts or omissions injured the migrants. In addition, anyone having the power to grant necessary and appropriate relief might be held legally responsible to the migrants under the agency doctrines of authorization, ratification, or *respondeat superior,* under a statute, or under some other rule of law, even though he did not cause their injuries.

Generally, in suits against state or federal officials the defendants should be the individual officials, not a government agency. The Eleventh Amendment to the Constitution prohibits suits against states in Federal Court. *Ex parte Young*, 209 U.S. 123 (1908). Government officials should be sued in their individual and official capacities.

In determining which persons should be named defendants, counsel also should consider any individuals whom he intends to call as witnesses at the trial and whom he would prefer to question in a leading manner, as if on cross-examination, without vouching for their credibility. If there is a legal basis for such a person's being named as a defendant, Rule 43(b) will permit counsel for the plaintiff migrants to call him during the plaintiff's case and question him as an adverse witness. In considering potential defendants, plaintiff's counsel should recognize that some discovery procedures may be used only against parties, notably written interrogatories (Rule 33), requests for production (Rule 34), and requests for admission (Rule 36). Where a person (or firm) against whom the plaintiff has a legal claim possesses records or information important to the plaintiff's pretrial preparation, his presence as a defendant in the case may facilitate discovery.

The names by which the defendants are sued should be exactly correct.

F. Facts

Rule 8(a) requires every complaint to contain a "short and plain statement of the claim showing that the [plaintiff] is entitled to relief." The complaint should allege facts from which the law will raise a duty owed by the defendants to the plaintiffs, and it should allege facts showing that the defendants breached the duty. It is not necessary to allege the duty itself. For example, under the current law of access to migrant labor camps, the allegation that the plaintiffs are residents of a labor camp that is owned and operated by the defendant is sufficient to show that the defendant has a duty not to prevent the plaintiffs' friends from entering the camp to visit under reasonable conditions.

Rule 9 provides the manner in which certain frequently alleged facts are to be pleaded. Otherwise, Rule 8 requires that the statement of claim should be "short and plain" and that each averment should be "simple, concise, and direct." The intent of the rule is indicated by the official complaint forms in the Appendix to the Federal Rules. (See forms 2-18) They are all short, plain, simple, concise and direct. 2A *Moore's Federal Practice*, ¶ 8.13, cites several cases where complaints have been dismissed because they were long and contained evidentiary and argumentative matter in violation of Rule 8.

However, some lawyers who are experienced in civil rights, civil liberties, and other public interest law practice regularly file complaints that state the facts in detail. Sometimes these complaints are long and even argumentative. Especially in test litigation or in litigation against a government agency, a large corporation, or some other powerful and conspicuous defendant, a detailed factual complaint that conveys an impression of thorough research and accurate statement may benefit the plaintiffs in several ways. If the news media are interested in the case, it will help them see things from the plaintiffs' standpoint. It may forestall retaliation against the plaintiffs or help them withstand pressure to withdraw the complaint or renounce the suit. It may persuade the court not to dismiss the complaint for failure to state a claim. It also may assist the defendant in conducting self-investigation that will help bring about a voluntary settlement.

Where two or more claims are alleged in the same complaint, the strongest claim should be pleaded first; the next strongest claim should be second, and so on. Allegations in the first claim that also are applicable to the second claim may be realleged by reference; they do not have to be repeated verbatim. (Rule 10(c))

G. Allegations Supporting Equitable Relief.

If an injunction or other equitable relief is requested, the facts supporting it should be alleged, (1) that the plaintiffs are suffering irreparable injury or are threatened with irreparable injury and (2) that they have no adequate remedy at law.

H. Prayer for Relief

The prayer for relief should set out the requests for declaratory judgment, injunction, and damages separately.

I. Signature

Rule 11 provides the manner in which a complaint is to be signed by an attorney of record. It is not required to be verified except in a few kinds of cases that do not usually involve migrants. (Rule 11, Federal Rules of Civil Procedure; see 2A *Moore's Federal Practice*, ¶ 11.02-11.04, for a list of situations where statutes require verfication.) However, in migrant cases verification may be advisable to support an application for a temporary restraining order after suit is filed (Rule 65) or to withstand a defense motion for summary judgment filed after the plaintiff migrants have left the jurisdiction. In both situations the complaint is to be used as a substitute for an affidavit. In these cases the statement of facts in the complaint should be as specific as a statement of facts in an affidavit and should show that the plaintiff who verifies the complaint has personal knowledge of those facts. (See 2A *Moore's Federal Practice*, ¶ 11.04.) If an interpreter is used, this fact should appear in the verification.

IV. Commencing Action

A civil action is commenced by filing a complaint with the court. (Rule 3) Except in emergency cases, normally the complaint is the only necessary document. Where additional documents are filed, they should be attached to the complaint as exhibits or appendices.

V. Filing Procedure

Rules 3 and 5(e) provide that the complaint should be filed with the Clerk of the Court. Counsel should offer the clerk the original for the court file, one copy to be served on each defendant, and one or two extra copies if the clerk or the marshal requests them. The clerk should be asked to file-stamp one copy so that counsel's own pleadings file will contain a copy of the complaint showing the date and time the original was filed with the court. A file-stamped copy should be obtained of every other court paper that is filed at the same time.

CHAPTER 12

SERVING SUMMONS AND COMPLAINT

I. Issuance and Contents of Summons; Fees

Rule 4(a) provides that upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specially appointed to serve it. The summons and complaint must be served on the defendant together. Rule 4(d). The purpose of the summons is to notify each defendant that the suit has been filed against him and to inform him of the time within which he must answer to avoid the entry of a default judgment.

The defendant is required to answer within 20 days after the summons and complaint are served upon him, unless the court directs otherwise when service is made pursuant to Rule 4(e). If the defendant is the United States or an officer or agency thereof, the answer is due within 60 days. Rule 12(a). Rule 4(e), discussed below, permits summons in a federal case to be served on parties outside the state according to the same procedures that are available in cases pending in state courts.

The form and contents of the summons are specified by Rule 4(b). An approved form of summons is set out as Form 1 in the Appendix of Forms to the Federal Rules of Civil Procedure. Blank summons forms are available at the District Court Clerk's offices. In some courts the clerk prepares the summons. In other courts counsel for the plaintiff is required to fill in the blanks.

The marshal's fees for service of summons are provided by 28 U.S.C. § 1921 and are subject to change by amendment to the statute from time to time. At present the fee is $3.00 plus mileage at the rate of 12¢ per mile. These fees may be required to be paid in advance. They are taxable as costs under § 1921.

II. Who May Serve Summons

Rule 4(c) provides that a summons may be served either by a United States Marshal, a Deputy Marshal, or by some person specially appointed by the court for that purpose (see Section VA of this chapter). Where a summons is to be served on a defendant outside the state in which the case is pending, service may be made either by the marshal (or deputy) in the district where the suit is pending or by the marshal (or deputy) in the district where the summons is to be served. See 2 *Moore's Federal Practice*, ¶ 4.08.

III. Where Summons May Be Served

Rule 4(f) provides that summons issuing out of a district court may be served on a defendant anywhere within the territorial limits of the state where the district court is held. Rule 4(d) also provides that summons may be served on a defendant individual (other than an infant or incompetent), or on a corporation, partnership, or association "in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state." Rule 4(f) also contains additional provisions covering service on third party defendants and new parties joined as needed for just adjudication.

The effect of Rule 4(d) is to make available to federal court plaintiffs the same statutes providing for service on out-of-state defendants as are available to state court plaintiffs. Thus, if the state has a long arm statute, plaintiffs in federal court in that state may make valid service of summons on out-of-state defendants under the long arm statute's provisions. There should be no practical advantage or disadvantage with respect to service of summons on out-of-state defendants resulting from the plaintiff's decision to file suit in federal court or in state court.

IV. Return

Rule 4(g) requires the person serving process "to make proof of service thereof to the court promptly and in any event within the time during which the person served must respond to the process." Where service is made by a specially appointed process server his return must be in the form of an affidavit.

V. Procedures in Migrants' Cases

Before suit is filed counsel should decide whether the summons and complaint should be served on the defendant by the United States Marshal, the usual method, or whether they should be served by a special process server appointed by order of court.

Service by the marshal has the following advantages: It requires less paper work on the part of plaintiff's counsel. It is impressive, and the sight of a marshal or deputy serving court papers on a grower in the presence of migrants or other growers may have immediate beneficial effects.

The advantages of a special process server are speed and reliability. A special process server should be appointed in most cases requiring emergency relief and in all cases where the work load in the marshal's office would cause delay in locating the defendant. If appointment of a special process server will save travel fees, that fact should be stated in the motion or the affidavit, or both. Rule 4(c) provides, "Special appointments to serve process shall be made freely when substantial savings in travel fees will result."

Where service is to be made by the marshal, counsel should consider giving him detailed written directions to the defendant's home or any other place where he can be found.

A. Service by Special Process Server

The procedure for using a special process server is as follows:

1. Before filing suit, choose someone to act as a special process server who can locate the defendants and serve the summons and complaint on them promptly.
2. Prepare a motion appointing that person a special process server and prepare an order making the appointment.
3. After filing the complaint in the clerk's office, file the motion; then present the motion and the order to a judge. Meanwhile, the clerk should issue summons. Rule 4(a).
4. After the order is signed, file it in the clerk's office.
5. Pick up the summons at the clerk's office.
6. Give the special process server as many copies of the complaint and summons as there are defendants, and tell him to serve a copy of each document on each defendant.
7. After the special process server has served the summons and complaint, prepare his affidavit

reporting service, have the affidavit signed and notarized, and file it in the clerk's office immediately. Keep a copy of the affidavit for your file.

B. Service by the United States Marshal or a Deputy Marshal

Upon filing suit, the clerk is mandated to issue summons "forthwith". Rule 4(a).

The summons and complaint must be placed with the United States Marshal for service by delivering to the marshal as many copies of each document as there are defendants. In most jurisdictions, counsel for the plaintiff also is required to fill out a "U. S. Marshals Service Instruction and Process Record", either at the clerk's office or the marshal's office. This government form comes in five parts. When plaintiff's counsel places the summons and complaint for service he is given Part 5 as a receipt. After the marshal completes or attempts service he makes his return to the Clerk of the Court on Part 1 and sends plaintiff's counsel notice of service on Part 3.

If the marshal's return shows that he was unsuccessful in serving the summons and complaint, counsel should apply to the clerk's office to have a new summons issued (Rule 4(a)), and either have the summons and complaint placed with the marshal again or have the summons and complaint served by a special process server according to the procedures outlined above in Section A

CHAPTER 13

EMERGENCY RELIEF

I. Introduction

This chapter discusses emergency federal court relief secured through issuance of preliminary injunctions and temporary restraining orders.

A temporary restraining order (TRO) is emergency relief until a motion for preliminary injunction can be heard and decided. A preliminary injunction constitutes emergency relief until the case can be tried on the merits and decided in favor of, or against, the issuance of a permanent injunction or some other permanent form of relief.

1. Notice. Under Rule 65, a TRO may be issued with or without notice to the adverse party. Notice is required for a preliminary or permanent injunction.

2. Duration. A TRO may remain in effect no longer than ten days (unless extended). Rule 65(b). A preliminary injunction may remain in effect until the case is tried on the merits or until it is vacated by order of the court. 7 *Moore's Federal Practice*, ¶ 65.06. A permanent injunction remains in effect until it is vacated by order of the court.

A. Types of Migrants' Cases Where Emergency Relief Is Required

Practically every situation in which migrants find themselves carries the potential for immediate and irreparable injury, justifying emergency relief. A TRO or preliminary injunction probably is justifiable in most cases of retaliatory firing and eviction and in most cases of denial of access to migrant labor camps. Emergency relief may also be needed in many cases involving regulatory statutes and benefit programs, especially in those cases where the subject matter of the regulation or the benefit law is food, health, camp housing, or other basic necessities of life. Further, emergency relief may be appropriate in some, but not as many, cases involving contract disputes. Finally, the transient nature of migrants' lives generally supports emergency relief or an expedited trial on the merits in most cases.

B. Where to Find the Law

Rule 65 of the Federal Rules of Civil Procedure covers temporary restraining orders in detail. However, the procedures for obtaining preliminary injunctions (except for a few important provisions in Rule 65) are governed mainly by local rules or customs that may vary from one judge to the other. In some courts, for example, plaintiff's counsel should file a motion for preliminary injunction, have it scheduled for hearing, and immediately serve notice on all other parties. In other courts, plaintiff's counsel should present to the judge an application for an order to show cause why the court should not issue a preliminary injunction. The judge signs the order, specifies the date on which the hearing is scheduled, and directs service of the order on the other parties.

To learn whether a particular court (or judge) requires the motion procedure or the show cause procedure, counsel should consult the local district court rules and interview clerks, law clerks, judges, attorneys, and others familiar with the court's procedures. Where there is a choice, the show cause procedure usually is preferable. The notice of hearing, issued by the judge and served by the court on the opponent, suggests that the judge has already given the migrants' application prelimi-

nary threshold consideration and has found some merit to it. The show cause order also may shift the burden of going forward with the evidence to their opponent at the hearing.

Local rules may or may not disclose the procedure to be followed to have an emergency motion scheduled for hearing. In most jurisdictions, the judge will have to be consulted before a date is set. The procedures outlined in this chapter assume that the accepted practice is for the attorney filing the motion to go to the judge's chambers and request the judge to set the date.

The procedures outlined in this chapter, regularly followed in some courts, are not followed in all. It is essential, therefore, that counsel learn as soon as possible the procedures that are regularly followed in the particular court in which he practices and, if they are lawful, to use them.

C. General Principles in Migrants' Cases Requiring Emergency Relief

Appointment of special process server. It probably will be appropriate, where emergency relief is required, to move for the appointment of a special process server. Speed in serving the adverse party with the complaint, summons, and documents relating to emergency relief can expedite the hearing on the migrants' application for preliminary injunction, and the marshal and his deputies may not be familiar with the area where the defendant must be found and served. (See Chapter 12 Serving Summons and Complaint.)

Bond. Rule 65(c) states "No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." A bond is not required to be posted as a condition of filing suit or filing an application for preliminary injunction or TRO. It is due only when the court is ready to grant emergency relief. Further, "(a)lthough the requirement of bond would seem to be mandatory, the courts have held in several cases that the discretion of the court as to the size of the bond includes the discretion not to require any bond." Barron & Holtzoff, *Federal Practice and Procedure*, § 1435.

The plaintiff migrants may avoid posting bond for costs at the time emergency relief is to be granted by proceeding *in forma pauperis* (see Chapter 7, Financial Aspects of Migrants' Litigation), or by persuading the court that their right to a preliminary injunction or restraining order is clear and that there is no likelihood that the defendant will incur costs or suffer damages as a result of the order.

Case planning. Before filing suit, plaintiff's counsel should decide (1) whether to request a TRO and (2) whether he wants the motion for preliminary injunction decided on the basis of testimony, affidavits, or both, and how soon he wants the first evidentiary hearing to be held.

1. Whether to request a TRO. A temporary restraining order should be sought only if immediate and irreparable injury, loss, or damage will result to the migrants before the adverse party or his attorney can be heard in opposition. Rule 65(b) requires that specific facts showing those circumstances must be set out in an affidavit or in a verified complaint. A TRO might be appropriate (1) where, for some reason, counsel for the migrants cannot contact the adverse party or his attorney in time for a hearing, but can serve the adverse party with a TRO in time to prevent the irreparable injury from occurring, or (2) where counsel for the migrants believes that serving notice on the adverse party will cause him to retaliate against the migrants before the hearing takes place. In addition to the affidavit or verified complaint setting forth the facts, there also must be filed a written certificate by the applicant's attorney stating the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required.

From the foregoing it should be clear that a TRO should not be requested except where necessary. Applying for a TRO without notice adds one procedural step and four court papers (the application, the TRO, at least one affidavit, and the attorney's certificate) to the tasks that plaintiff's counsel must perform and only produces an *ex parte* order that will expire in ten days or less. The same deterrent effect may be achieved just as promptly if the adverse party is served with an order to show cause why a preliminary injunction should not be granted at a hearing set for a date in the near future.

2. **Whether the preliminary injunction should be considered on testimony or on affidavits, and when the first evidentiary hearing should be held.** The court may consider affidavits or testimony, or both, in deciding whether to issue a preliminary injunction. If there is to be an evidentiary hearing at which witnesses testify, the court may schedule the hearing early or may postpone it for a long time. Under Rule 65(a)(2), the judge may consolidate the hearing on the preliminary injunction with the trial of the action on the merits. Even if consolidation is not ordered, any evidence such as testimony, which is received on the application for a preliminary injunction and would be admissible at the trial on the merits, becomes part of the record on the trial and need not be repeated at the trial.

Under these circumstances, it is advisable for migrants' counsel to expect and encourage consideration of the motion for preliminary injunction on testimony at the earliest possible date for the following reasons:

1. Most migrants' cases involve controverted facts and issues of credibility between witnesses for the opposing sides. Such cases usually cannot be decided responsibly on affidavits alone. 7 *Moore's Federal Practice*, ¶ 65.04[3].

2. The plaintiff migrants and their witnesses probably will testify more effectively shortly after the occurrence because the facts will be fresh on their minds and they will still be outraged.

3. Presenting the migrants' testimony at an early hearing will preserve their testimony for trial and may eliminate the need for them to be deposed or interviewed by any of the parties' attorneys later, once they have left the jurisdiction.

4. If the court is to hear testimony at an early date, the affidavits can be more succinct and they can be drafted more quickly than if the court is to decide the application for a preliminary injunction on affidavits alone.

Migrants' counsel may consider moving for an order under Rule 65(a)(2), advancing the trial of the action on the merits and consolidating it with the hearing on the application for a preliminary injunction, when such action will be to the migrants' advantage. The main reasons for consolidation are that it would save the court's time to hold one proceeding instead of two; that the migrants' work will require them to leave the jurisdiction soon; and that if relief is granted by a permanent injunction, rather than by a preliminary injunction, a cost bond would not be required under Rule 65(c).

However, the question, whether the trial on the merits should be consolidated with the hearing on the motion for preliminary injunction, loses some of its importance in cases where the migrants leave the jurisdiction soon after suit is filed. In many such cases the ruling on the migrants' application for emergency relief disposes of the entire case, or the case becomes moot or can be settled after the preliminary hearing and without a trial on the merits. Further, the requirement of a bond is eliminated from many migrants' cases because the plaintiff migrants proceed *in forma pauperis.*

As a general practice, counsel for the migrants should expect and prepare for an evidentiary hearing at the earliest possible date and should do everything reasonable to expedite it.

II. Preliminary Injunctions

A. Legal Considerations

The party seeking a preliminary injunction should allege and prove facts that show the following:

1. The defendant is causing, or threatening to cause, immediate and irreparable injury to the plaintiff so that an injunction is needed pending a trial of the case on the merits.
2. The defendant would suffer significantly less injury under an injunction than the plaintiff would sustain if an injunction is not granted.
3. The plaintiff probably will prevail at the trial on the merits.

An order granting or refusing a preliminary injunction is appealable under 42 U.S.C. § 1292(a)(1). However, the grant or refusal of a temporary restraining order may not be appealed. *Grant v. United States,* 282 F.2d 165, 167-168 (2 Cir. 1960). (A refusal to grant a TRO was appealed and reversed in an exceptional case, *United States v. Wood,* 295 F.2d 772 (5 Cir. 1961), *cert. denied,* 369 U.S. 850 (1962).)

There are no procedures by which a party can obtain prompt court action on a motion for preliminary injunction, an application for a rule to show cause, or an application for a temporary restraining order which the court refuses to consider.

B. Court Papers Required

It is a pecularity of the legal system that in emergency situations, where effective action must be taken within the shortest possible time, counsel is required to prepare more court papers than in any other litigation situation. Where a preliminary injunction is to be sought immediately on filing suit, migrants' counsel needs to draft pleadings to obtain leave to proceed *in forma pauperis,* documents to commence the action, preliminary injunction papers, documents to obtain appointment of a special process server or to obtain service of process by the marshal, and any other documents that may be needed to start discovery, as shown by the list following.

Court Papers That May Be Required on Filing of Suit

1. *In forma pauperis* documents, where applicable (see Chapter 7, Financial Aspects of Migrants' Litigation.):
   a. Motion for leave to proceed *in forma pauperis*
   b. Order granting leave to proceed *in forma pauperis*
2. Documents to commence action:
   a. Complaint
   b. Summons (if the summons must be prepared by plaintiff's counsel rather than by the clerk's office). See Form 1, Federal Rules of Civil Procedure.
3. Preliminary injunction papers:
   a. Motion for preliminary injunction
   b. Affidavits and exhibits in support of motion
   c. Order to show cause or notice of motion for preliminary injunction

d. Memorandum of points and authorities in support of motion

4. Documents for appointment of a special process server, where applicable (see Chapter 12, Serving Summons and Complaint):
   a. Motion for appointment of a special process server
   b. Order appointing a special process server
5. Papers for the United States Marshal (if service is not to be made by a special process server):
   a. U. S. Marshal's Service Instruction and Process Record
   b. Detailed written instructions for locating the defendant, if he will be hard to find
6. Documents to start discovery (see Chapter 14, Discovery).

After suit is filed and before an order is entered granting the preliminary injunction, counsel should prepare a proposed injunction, findings of fact, and conclusions of law for the court's use. See Rule 52(a); *Moore's Federal Practice*, ¶ 65.12.

C. Procedures

This section outlines a series of steps intended to obtain leave to proceed *in forma pauperis*, to file suit, to file a motion for preliminary injunction and have the preliminary injunction set for hearing, to obtain issuance of summons, and to have a special process server appointed. (For the procedures necessary to obtain service of process by the marshal, where a special server is not appointed, or to start discovery in emergency cases, see Chapter 12, Serving Summons and Complaint and Chapter 14, Discovery.)

1. Interview the prospective plaintiff and any witnesses. Perform any preliminary investigation that is necessary.

2. Before drafting any affidavits, make a quick draft or outline of the motion for preliminary injunction to use as a checklist of essential facts that need to be supported by one or more of the affidavits.

3. Prepare the affidavits and exhibits. Have them signed and notarized. If an interpreter is used, add his certificate to the affidavits.

4. Draft the following documents:
   a. Complaint.
   b. Motion for leave to proceed *in forma pauperis* and order granting motion.
   c. Motion for preliminary injunction, show cause order or notice of motion, and memorandum of points and authorities in support of the motion. Leave blanks in the notice or show cause order for the date and time of the hearing (and the place, if court is held in two or more places).
   d. Motion for appointment of a special process server and an order appointing special process server, or prepare the U.S. Marshal's Service Instruction and Process Record and a set of specific, detailed instructions for locating the defendant.
   e. Summons (if it must be prepared by plaintiff's counsel rather than by employees in the District Court Clerk's office).
   f. Any documents that may be needed to start discovery.

5. Take all of the documents to the office of the Clerk of the United States District Court. The procedures to be followed at the courthouse depend on whether or not the plaintiff is proceeding *in forma pauperis*.

Where the plaintiff proceeds *in forma pauperis,* take the following steps:

a. File the motion for leave to proceed *in forma pauperis.*

b. Take the motion and the rest of the court papers to the judge. (At this point the plaintiff needs an order granting him leave to proceed *in forma pauperis* and, if applicable, an order appointing a special process server. He also needs to have the motion for a preliminary injunction set for hearing.) First, present the motion for leave to proceed *in forma pauperis.* When the judge has signed the order granting leave, ask him to set a date and time at which a motion for preliminary injunction can be heard. (If he holds court in two or more places, make sure you also know where the motion is to be heard.) If under local practice an order to show cause is appropriate, present the order to the judge. After he has signed it (or refused to sign), present the motion for the appointment of a special process server.

c. At the Clerk's office fill in the date, time, and place of the hearing in the notice of motion or in the show cause order (if that has not already been done). Then file the following documents: (1) Order granting leave to proceed *in forma pauperis*, (2) Complaint, (3) Motion for preliminary injunction, affidavits and exhibits, and memorandum of points and authorities, (4) Order to show cause (if signed by the judge) or notice of motion, (5) Motion for appointment of a special process server and order appointing a special process server.

Where the plaintiff is *not* proceeding *in forma pauperis,* take the following steps:

a. File the complaint, the motion for preliminary injunction, the affidavits and exhibits, the memorandum of points and authorities in support of the motion for preliminary injunction, and the motion for appointment of a special process server.

b. Take those papers (or file-stamped copies of them) together with the remaining court papers to the judge. Request that a date and time be set for the hearing on the motion for preliminary injunction. (If the judge holds court in two or more places, make sure you know where the motion is to be heard.) If under local practice an order to show cause is appropriate, present the order to the judge. After he has signed it (or refused to sign), present the motion for appointment of a special process server.

c. At the clerk's office, return any previously filed papers. Fill in the time, date, and place of the hearing in the notice of motion or in the show cause order (if that has not already been done). Then file the following documents: (1) Notice of motion or signed order to show cause, and (2) Order appointing a special process server

6. As the next step in all cases, the clerk should issue summons.

7. Place the following papers for service with the marshal or with the special process server (if one has been appointed):

a. Complaint

b. Summons

c. Notice of motion or signed order to show cause, motion for preliminary injunction, affidavits and exhibits, memorandum of points and authorities.

8. Prepare for the hearing.

III. Temporary Restraining Orders

A. Court Papers Required

Where a temporary restraining order is to be sought immediately on filing suit, counsel for the migrants should draft the following documents mentioned previously in connection with preliminary injunctions:

1. *In forma pauperis* documents (where applicable)
2. Documents to commence action
3. Preliminary injunction papers (a) Motion for preliminary injunction, (b) Affidavits and exhibits in support of motion (unless all of the affidavits and exhibits are to be filed in support of the application for TRO instead).
4. Documents for appointment of a special process server (where applicable) or papers for the United States Marshal.

In addition, counsel should prepare the following documents to obtain a temporary restraining order:

1. Application for temporary restraining order.
2. Affidavits and exhibits in support of the application.
3. Attorney's certificate under Rule 65(b) stating the efforts, if any, which have been made to give notice to the adverse party and the reasons why notice should not be required.
4. Temporary restraining order, granting temporary relief and setting a date and time for the hearing on plaintiff's motion for preliminary injunction.

B. Procedures

The steps to obtain issuance of a temporary restraining order are the same as those outlined to obtain a preliminary injunction, above, with the following differences:

1. – 2. Before drafting affidavits, outline the application for TRO in addition to the motion for preliminary injunction.

3. – 4. After completing the affidavits, draft the following documents:
   a. Complaint.
   b. *In forma pauperis* documents.
   c. Notice of motion and motion for preliminary injunction.
   d. Motion for appointment of a special process server and order appointing a special process server, or papers for the United States Marshal.
   e. Summons (if it must be prepared by plaintiff's counsel).
   f. Application for temporary restraining order, attorney's certificate under Rule 65(b), memorandum of points and authorities, and temporary restraining order.
   g. Any documents needed to start discovery

5. If the plaintiff is proceeding *in forma pauperis*, file the motion for leave to proceed *in forma pauperis;* then go to the judge and present the motion. When he has signed the order granting leave, show him the complaint and motion for preliminary injunction and present the application for a temporary restraining order to him, together with the affidavits and exhibits and the memorandum of points and authorities in support of it. When he has set a date and time for hearing the motion for preliminary injunction and signed the temporary restraining order (or refused to sign it), present the motion for appointment of a special process server. When the judge has signed the order appointing a special process server, return to the clerk's office and file the following documents: the order granting leave to proceed *in forma pauperis;* the complaint; the motion for preliminary injunction; the affidavits, exhibits and memorandum of law in support of the motion for preliminary injunction; the motion for appointment and the order appointing a special process server; the application for a temporary restraining order; the affidavits, exhibits, and memorandum of points and authorities in support of the application for a TRO. If the judge has signed the temporary restraining order, it should be filed also.

If the plaintiff is not proceeding *in forma pauperis*, file the complaint, the motion for preliminary injunction, the affidavits and exhibits in support of the motion for preliminary injunction, the application for a TRO, the affidavits and exhibits and memorandum of points and authorities in support of it, and the motion for appointment of a special process server. Take those papers (or file-stamped copies of them) to the judge. Present the application for a TRO to him. When he has set a date and time for hearing the motion for preliminary injunction and signed the order (or refused to sign it), present the motion for appointment of a special process server. When he has signed the order appointing a special process server, return to the clerk's office. Hand back to the clerk any previously filed papers. Then file the signed temporary restraining order (with date, time, and place of hearing filled in), and the order appointing a special process server.

6. – 7. After the clerk issues the summons, the following documents should be placed with the marshal for service on the defendant: the complaint, summons, motion for preliminary injunction, the application for TRO, and the temporary restraining order. The affidavits, exhibits, and legal memoranda in support of the preliminary injunction and the temporary restraining order should be served on the defendant with the rest of the papers.

8. Prepare for the hearing.

CHAPTER 14

DISCOVERY

1. General

As the name suggests, discovery procedures can be used to find out facts, and also to prove facts, narrow the issues in the case, and persuade the court.

Rule 26(a) specifies the following formal methods of discovery: depositions on oral examination, depositions on written questions, written interrogatories to parties, production of documents or other things for inspection and copying, entry on land or other property, physical and mental examinations, and admissions. Guidelines applicable to discovery are found in Rules 26-37 of the Federal Rules of Civil Procedure.

The general provisions of Rule 26 cover the scope of discovery, matters that are privileged against discovery, procedures by which a party may find out the opinions of experts consulted by another party, protective orders, sequence and timing of discovery, and supplementation of responses to requests for discovery to correct them or to make them complete. Rule 29 generally allows the parties to stipulate to the manner in which discovery will be conducted. Rule 37 provides for sanctions against parties who fail to make discovery in compliance with the rules.

The following chart relating to the discovery devices most often used in migrants' cases shows the manner in which each discovery procedure is commenced, the time allowed for response, and the circumstances under which court action is required. The times provided by the rules may be lengthened or shortened by court order. Where the rules normally allow 30 days for a response to interrogatories, a request for production, or a request for admissions, they allow a defendant 45 days within which to respond after he has been served with the summons and complaint. In addition to the instances mentioned in the chart where court action is required, any party may move for a protective order against annoyance, embarrassment, oppression, or undue burden or expense (Rule 26(c)) or for an order imposing sanctions for failure to make discovery (Rule 37).

Procedure	Rule Number	How Procedure Is Commenced	Time for Response	When Court Action Is Required
Depositions on oral examination	30	Serving notice	Reasonable	Plaintiff seeks to take deposition less than 30 days after service of summons (see exceptions in Rule 30(d) and Rule 30(b)(2)).
Depositions on written questions	31	Serving notice and questions	30 days	
Interrogatories to parties	33	Serving interrogatories	30 days	Objections or failure to answer.

Production of documents and entry on land	34	Serving request	30 days	Objections or failure to respond.
Requests for admission	36	Serving request	30 days	Objections or answer not in compliance with rule.

II. Characteristics of Discovery Methods

In deciding which of the seven discovery procedures to use in a particular situation, counsel should consider the following characteristics.

1. The effectiveness of that procedure for the desired purpose: finding out facts, narrowing the issues, proving facts, or persuading the court;
2. Other purposes that can be served by use of that procedure on this occasion, for example, commencing negotiations;
3. Cost in money;
4. Cost in attorney time;
5. Convenience;
6. The time that will elapse between the attorney's decision to use the procedural device and the receipt of the desired information;
7. The extent to which use of that procedure permits opposing counsel to interfere with discovery and trial preparation;
8. The prospects that opposing counsel will take advantage of any opportunity to interfere with discovery and preparation;
9. The usefulness at trial of the information in the form in which it will be obtained through use of the procedure in question;
10. The extent to which the use of the procedure requires counsel to reveal the strategy of preparation and trial (a) before receiving any information that is called for by the procedure, or (b) before trial; and
11. Counsel's relationship with his own client and witnesses.

III. Discovery Methods

The following sections discuss individual discovery methods. The first three methods are techniques for obtaining discovery by questioning witnesses on oral depositions, at depositions on written questions, and through written interrogatories. Also covered are techniques for obtaining production of documents and other things, obtaining the right to enter on land, and eliciting admissions from other parties. The rules for physical and mental examinations of persons are not discussed because plaintiffs in migrants' cases usually do not have occasion to obtain physical or mental examinations of the defendants.

A. Depositions on Oral Examination (Rules 28, 30, and 32)

A deposition on oral examination is an out-of-court proceeding at which the attorneys for one or more parties question a witness.

Deposition procedure. The rules provide for certain formalities to be observed in scheduling and taking depositions, but the customary practice varies from place to place and depends on the relationships among counsel for the various parties in the case. In some towns it would be correct for counsel intending to take a deposition to set the date and time, arrange for a court reporter, serve a subpoena on the witness, then serve notice on the attorneys for all other parties and mail a copy of the notice to the clerk for filing. In other places it would be usual for counsel first to arrange a date and time satisfactory to the other attorneys in the case, then to serve a subpoena on the witness, arrange for a court reporter, and confirm by letter to the other attorneys that the witness's deposition will be taken at the date and time agreed upon.

Where counsel needs to question a witness about documents at the deposition, two procedures are available. If the witness is not a party, he should be served with a subpoena *duces tecum* under Rule 45(b), commanding him to produce at the deposition the books, papers, documents, or other things named in the subpoena. The deposition notice must show that the witness has been served with such a subpoena and must state the materials that are to be produced. If the witness is a party or a representative of a party, Rule 30(b)(5) provides that counsel may serve him with a request to produce documents at the deposition, pursuant to Rule 34, at the same time he serves the party with notice of the deposition. (Rule 30(b)(5)) provides, "The procedure of Rule 34 shall apply to the request," perhaps meaning that the 30-day waiting period between service of the request and the other party's response will have to be observed, thereby delaying the deposition longer than usual under the procedures of Rule 30. To avoid uncertainty where speed is important, counsel probably should serve a subpoena, not a request to produce.

If the party to be deposed lives outside the judicial district where the action is pending, counsel should schedule his deposition in the county where the witness resides or works, serve notice of the deposition on all other parties, then obtain a signed, sealed subpoena from the office of the clerk of the federal court for the district in which the witness resides, and have the subpoena served on the witness, all as provided by Rule 45(d).

Comparison between oral deposition and other methods of obtaining discovery by questioning witnesses. A deposition on oral questions is often the only satisfactory way to discover certain kinds of facts, such as an eyewitness's description of an occurrence. However, depositions conducted in the usual manner, before a court reporter who takes down the questions and answers stenographically and then prepares a typewritten transcript, are expensive.

The three substitute methods for questioning witnesses, oral depositions recorded by non-stenographic means (Rule 30(b)(4)), written interrogatories (Rule 33), and depositions on written questions (Rule 31), can reduce the expense by eliminating the need for a stenographic transcript; but they often take more attorney time in obtaining leave of court for non-stenographic recording or preparing and serving written questions. Further, written interrogatories are available as a substitute for oral depositions only where the witness is a party or a representative of a corporation, partnership, association, or government agency which is a party, as provided by Rule 33(a). Written interrogatories are not available as a substitute for an oral deposition of a non-party witness.

Under the time periods provided by the rules, a deposition on oral questions involves less waiting time between the date counsel decides to initiate the procedure and the time he obtains the information. Rule 30(b)(1) requires only that counsel give the other parties reasonable notice. By contrast, there is a waiting period of 30 days for answers to interrogatories (Rule 33(a)) and the delay for a deposition on written questions is even longer (Rule 31).

An oral deposition enables counsel to inquire into the facts more thoroughly than he can by written interrogatories or depositions on written questions. A witness cannot evade questioning on an oral deposition as easily as he can evade giving direct, responsive answers to written interrogatories or questions on a written deposition, where the questioner submits the entire list of questions

in writing in advance and is not present when the witness gives his answers.

An oral deposition is less vulnerable to lawyer interference. The attorney for the witness usually discusses the deposition with the witness in advance and anticipates as many of the questions as he can so the witness will not be surprised, but while the question-and-answer period is in progress the witness is on his own. By contrast, the attorney for the party served with written interrogatories often composes the answers himself.

Oral depositions are superior to all other methods of discovery in enabling counsel to obtain information without revealing his strategy of preparation and trial.

Oral depositions recorded by non-stenographic means. Rule 30(b)(4) provides a procedure by which any party may arrange for an oral deposition to be recorded and preserved by non-stenographic means, such as tape recording or videotape. Non-stenographic recording has two potential advantages, reduced cost—because a court reporter's transcript is not needed—and increased information—the record of the voices or pictures of the attorneys and witness.

Because non-stenographic recording gives rise to problems of accuracy and trustworthiness the party taking the deposition is required to apply for a court order designating the manner of recording, preserving, and filing the deposition. Use of non-stenographic recording may pose a dilemma for the party taking the deposition. If he files the tape with the clerk immediately after the deposition so as to assure the court and all parties that it will not be tampered with, he probably will not be able to have the tape transcribed or copied so it can be used in preparation for trial. If he does not file the tape with the clerk, he will need court approval of the method of handling. He may be forced to make a duplicate recording at the deposition for his own use.

B. Depositions on Written Questions (Rules 28, 31, and 32)

A deposition on written questions may be useful as an inexpensive though time-consuming substitute for an oral deposition of a witness who lives a long distance from the place where the case is pending. The main financial saving is in lawyers' transportation costs and travel time.

A deposition on written questions, like an oral deposition, must be recorded. The recording is usually done stenographically and then transcribed, though there is no reason why a deposition on written questions cannot be recorded on tape if the parties stipulate under Rule 29 or if one party obtains an order under Rule 30(b)(4).

The procedures for preparing and serving the notice of deposition and the written questions, cross questions, redirect questions, and recross questions are set out in Rule 31(a). After all of the questions have been served by all parties on each other, the party initiating the deposition should make the following arrangements through corresponding counsel in the city where the witness lives:

1. Arrange for a court reporter who is a notary to take the deposition of the witness on a specified date at a place in the county where the witness resides or is employed or transacts his business in person, as required by Rule 45(d)(2).
2. Have a subpoena issued by the clerk of the federal court for the district in which the deposition is to be taken and served on the witness, as provided by Rule 45(d)(1).
3. Request the court reporter to mail a copy of the deposition to him and to each other attorney who wants one, at the same time the reporter mails the original to the court where the case is pending.

The procedures to be followed by the court reporter are set out in Rule 31(b), (c).

Depositions on written questions can be used most effectively to obtain the testimony of a sympathetic non-party witness whose deposition will be admissible at the trial under Rule 32(a)(3). The deposition should be taken only if counsel for the party initiating the deposition knows exactly

what the witness is going to say. If the witness is hostile and gives damaging testimony, the opposing party may offer the deposition in evidence at the trial under Rule 32(a)(3). If counsel hopes by a deposition on written questions to find out facts he does not know already, the results probably will not justify the effort. A telephone call to the witness would be a more effective way to get the information.

C. Written Interrogatories to Parties (Rule 33)

The procedures for serving written interrogatories on another party are provided by Rule 33(a). Although the rule does not require the interrogatories, answers, or objections to be filed in court, the originals should be filed at the same time copies are served on the other parties so the court will have them for eventual use at the trial or at any hearing that involves them.

Written interrogatories have always been used effectively for the following purposes: (1) discovering the names and addresses of potential witnesses, (2) discovering the existence and location of relevant documents, and (3) establishing undisputed facts. Written interrogatories also have been used often as a less expensive substitute for an oral deposition of a party. Since the 1970 amendments to Rules 26(b), and 33(b), interrogatories also may be used to inquire into another party's opinions, claims, and contentions that relate to facts or to the application of law to facts.

Written interrogatories are more convenient and less costly financially than any other discovery method. However, they do have drawbacks, among them that the answers or objections to interrogatories are not due to be received until 30 days after they are served, and that the answers are likely to have been composed by the other party's lawyer, not by the party himself. Also, it is difficult for counsel to draft clear interrogatories without disclosing his strategy in the part of the case to which the interrogatories relate.

D. Production of Documents or Other Things and Entry on Land (Rule 34)

Through the use of Rule 34 procedures, documents may be obtained for inspection and copying; other "things" may be made available for inspection, testing, or sampling; and migrants and their representatives may gain the right to enter on designated land or other property within the defendant's possession or control. The request for production of documents should state the date, time, and place at which the documents are to be produced. The date should be approximately 35 days after the date the request is to be served, to allow the 30 days provided by Rule 34(a) to elapse before the other party's response is due. The place of production should be wherever the records are normally kept (usually the defendant's office) for several reasons. Production there is less burdensome on the defendant than production elsewhere. If the records are produced there rather than at the office of counsel for one of the parties, defense counsel is less likely to screen the documents so as to restrict his client from full production. Going to the defendant's office may give migrants' counsel a better understanding of the defendant's operations and recordkeeping system.

The original request for production should be mailed to the clerk for filing, and copies should be served on all other parties.

As a substitute for Rule 34 production and inspection where voluminous records would have to be inspected and analyzed to obtain the necessary information, counsel may serve written interrogatories on the defendant, asking for the same information. Rule 33(c) gives the respondent

the option to produce the records instead of answering the interrogatories if the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatories as for the party served. Despite this, in many cases migrants' counsel should be able to persuade the defendant or the court that the burden would be heavier on the migrants because the defendant is more familiar with his own records, and his resources for analyzing them are vastly superior to the migrants'.

In cases involving a denial of a right of access to a migrant labor camp, counsel should obtain entry into the camp to inspect and photograph it under Rule 34. Such inspection often discloses facts that will be useful at the trial. It also incidentally demonstrates to the camp occupants before the case is decided on the merits that the plaintiff, his lawyer, and his other representatives have been able to obtain access to the camp through legal means.

Rule 34 discovery is available only against other parties. Production of documents and other things in the possession or control of non-parties may be obtained by serving them with a subpoena *duces tecum* (Rule 45), commanding them to produce the designated matters at a deposition or at the trial. Rule 34(c) also makes clear that counsel may pursue against a non-party an independent action in the nature of a bill in equity for discovery, including production of things or entry on land or other property.

E. Admissions (Rule 36)

A party may request any other party to admit the truth of matters according to the procedure outlined in Rule 36. Admissions establish facts and narrow the issues that have to be tried.

Admissions and interrogatories are similar methods for narrowing the issues in a case. Interrogatories should be asked when the party does not know the answer, is willing to accept any answer within reason, and wants the fact settled before trial. For example, "How many shotguns, knives, and other weapons were you carrying in your pickup truck when you arrived at Any Camp on June 20, 1972? Describe each such weapon." Admissions should be asked when the party believes he knows the fact and wants that fact established before the case is tried.

Requests for admissions often are served alone. A better technique is to serve a request for admissions in combination with a parallel set of interrogatories that seeks to avoid a bare denial of the facts in the request by asking the opponent to correct any inaccuracies in them. For example, the requests might begin as follows:

> "Plaintiff Any Migrant requests that the defendant Any Defendant admit the truth of the following facts:
>
> "1. The following are the names and locations of all of the farm labor camps that were operated by the defendant during 1972:" (list them).

The written interrogatories, in a separate document served on the defendant at the same time as the requests for admissions, should begin as follows:

> "Plaintiff Any Migrant requests the defendant Any Defendant to answer the following interrogatories separately and fully in writing and under oath and to serve a copy of the answers on the undersigned counsel for the plaintiff within 30 days after service hereof:
>
> "1. A request to admit facts has been served on you at the same time as these interrogatories. Request No. 1 contains a list of the names and locations of all of the farm labor camps that were operated by the defendant during 1972. If the defendant claims that that list is inaccurate or incomplete in any respect, please state the names and locations of all of the farm labor camps that were operated by the defendant during 1972."

The two documents then should continue in parallel fashion, Request No. 2 stating another fact and Interrogatory No. 2 asking the defendant, if he claims the fact is inaccurate or incomplete in any respect, to state it correctly and completely, and so on.

IV. Application of Discovery Methods to Discovery Problems

This section describes some of the discovery problems most frequently found in migrants' cases and suggests discovery methods that can be used to handle them.

A. Preserving the Testimony of Migrants Who Are about to Leave the Jurisdiction

Often in migrants' cases growing out of occurrences like retaliatory firing or eviction or denial of access to a labor camp, the migrants and their favorable witnesses leave the jurisdiction soon after suit is filed. Their oral depositions should be taken before they leave.

Rule 30(b) provides that a deposition may be taken at any time without leave of court under the following circumstances: the notice of deposition must state that the person to be examined is about to go out of the district where the action is pending, and more than 100 miles from the place of trial, and will be unavailable for examination unless his deposition is taken before the expiration of 30 days after service of the summons and complaint on the defendants, and the notice must set forth facts to support the statement and be signed by the attorney. Counsel should do everything reasonable to assure that the opponent's lawyer will be present at the deposition because of the last sentence of Rule 30(b)(2), which raises the possibility that otherwise the deposition may not be used.

Taking the depositions of the plaintiff migrants and their favorable witnesses before they leave has several advantages, in addition to preserving their testimony for use at the trial. Taking their depositions should forestall the defendant's obtaining summary judgment based on affidavits that otherwise might not be contradicted. If the migrants' depositions are taken and defense counsel appears and cross-examines them, plaintiff's counsel should be able to obtain a protective order against any further depositions of those same witnesses at the instance of the defendant after they have left the jurisdiction and under circumstances that would impose travel expenses and other financial burdens on the migrants and their attorneys.

A deposition should be taken without leave of court under Rule 30(b)(2) only if it is to be recorded by stenographic means. If a tape recorder or some other non-stenographic means of recording is to be used, requiring leave of court under Rule 30(b)(4), then counsel at the same time should obtain an order pursuant to Rule 30(a), granting him leave to take the migrants' depositions less than 30 days after service of the summons and complaint on the defendants, thereby reducing the risk involved in a deposition under Rule 30(b)(2) that defense counsel will not be present at the depositions and will obtain an order preventing the depositions from being used against him.

B. Discovering the Names of Witnesses and Persons Having Knowledge of Relevant Facts and Discovering the Existence and Location of Documents

Written interrogatories are the most economical and direct method for discovering these facts. Persons questioned at oral depositions should be asked the names of any witnesses and the existence

and location of any documents. Records inspected pursuant to Rule 34 often disclose the names of potential witnesses and other persons who have knowledge of relevant facts.

C. Determining the Facts of an Occurrence

Eyewitnesses and others having knowledge of the facts should be interviewed. If they are adverse parties, if they are unwilling to talk about the occurrence informally, or if their testimony needs to be preserved because they will be unable to attend the trial, their oral depositions should be taken. Written interrogatories are a less expensive substitute for an oral deposition of a party. A deposition on written questions is a less expensive substitute for an oral deposition of a sympathetic non-party witness who lives a long distance from the place where the action is pending.

D. Obtaining the Testimony of a Witness Who Will be Unable to Testify in Person at the Trial

An oral deposition is the best method for preserving and obtaining the testimony of a witness under the conditions specified in Rule 32(a)(3). A deposition on written questions is a less expensive substitute. If a deposition cannot be obtained successfully, counsel should consider trying to eliminate the issues on which the witness's testimony would be needed, by means of interrogatories, requests for admissions, or an order on pretrial hearing.

E. Preparing Cross-Examination of Adverse Witnesses

Each adverse witness's oral deposition should be taken before trial. Written interrogatories are an inadequate substitute for an oral deposition of an adverse party witness, but they are sometimes better than nothing. Where relevant documents exist, their production is essential to prepare for cross-examination.

F. Narrowing Issues

To narrow the issues by establishing undisputed facts, written interrogatories or requests for admissions, or both, should be used as outlined above. Counsel also may obtain admissions and establish undisputed facts in an opposing party's deposition or by discovery documents that make the facts clear.

To narrow the issues by narrowing the opponent's claims and contentions and making them more specific, written interrogatories should be used. Pretrial conference procedure in many courts involves the entry of a pretrial order that specifies and narrow the issues of fact. Counsel should prepare for pretrials of that sort and use the procedure to best advantage.

G. Determining How the Defendant's Business Operates

Often in cases involving regulatory statutes, benefit programs, or contract claims it is necessary to discover how the defendant operates some part of his business. For example, in a minimum wage

case under the Fair Labor Standards Act the plaintiff needs to know the defendant employer's personnel and payroll system.

Investigating any system of business, management, or administration usually requires an investigation of the records system, followed by an analysis of the business through its records and the testimony of its administrators. Such an investigation involves five distinct operations:

1. Finding out what records are relevant to the part of the business in question, locating the records, and determining which persons know enough to testify about the records system and the way the various documents are used;
2. Obtaining production of the records for inspection and copying and taking the deposition of a person who can explain the records system;
3. Analyzing the records to discover as much as they will reveal about the practices followed in that part of the business and the results those practices produce;
4. Taking the deposition of the administrator or manager of that part of the business, who will probably be one of the defendants, to obtain his description of the practices followed in that part of the business, including the procedures that are followed and the standards that are applied; and
5. After the deposition, comparing the practices employed in that part of the business as described by the administrator in his deposition (step 4) with the practices disclosed by counsel's analysis of the records (step 3), in order to arrive at the truth.

The investigation can be done in one, two, or three discovery proceedings, depending on the size of the business, the volume of records, and the amount of time available for discovery. Where the business is large and there are many records, the defendant administrator is not the record-keeper, and sufficient time is available, the investigation should be made as follows:

1. Serve interrogatories requiring the defendant (a) to identify the relevant documents and disclose their location and (b) to name the person who keeps the records and regularly uses the records system.
2. After receiving the defendant's answers to the interrogatories, obtain production of the records at the defendant's office pursuant to Rule 34. Also, serve a notice of the deposition of the record-keeper. The person to be deposed should be the person named in the answers to interrogatories under 1(b), above; or, if the defendant is a corporation, partnership, association, or government agency, the notice, instead of naming the individual deponent, may describe the matters on which he is to be questioned, as provided by Rule 30(b)(6), and require the defendant to produce the appropriate person for the deposition. To assist migrants' counsel in inspecting the records, the deposition should cover the records system and the way in which it is used. Under Rule 30(b)(5) the notice of deposition and the request for production may be served together. Call for the records to be produced at the same time as the deposition. If there are many records or several different kinds, it will save everyone time to have them produced before the deposition so plaintiff's counsel can make a preliminary examination of them.
3. After having the records explained and making an analysis of them, plaintiff's counsel should take the deposition of the administrator of the part of the business in question.

Where the business is small, there are only a few records to be inspected, the defendant administrator is closely familiar with the way the records system actually works, and time is limited, the investigation may be made in one step, as follows: Serve a notice of the defendant's deposition and a request for production at the deposition of the types of documents required, as provided by Rule 30(b)(5). Inspect the records at the deposition and question the defendant about them.

V. Discovery in Emergency Cases

A. Discovery Before Hearing

In cases where emergency relief must be obtained immediately or at any time within 30 days after suit is filed, plaintiff's counsel may be able to prepare for the hearing by using the following procedures to obtain the deposition of an opposing party witness and production of records:

1. Schedule the deposition. Arrange for a court reporter (or tape recorder) to be available. Ask the court reporter to be ready to transcribe the deposition immediately after it is taken.
2. Prepare the following documents: (a) Notice of motion (leave the dates blank for the hearing on the motion and for the deposition). (b) Motion under Rule 30(a) for leave to take the deposition, stating the name of the deponent. The motion also may request that the deposition be recorded by non-stenographic means pursuant to Rule 30(b)(4). The motion also should request an order shortening the time for production of documents under Rule 34(b) and requiring the deponent to produce the documents specified in the motion at the deposition. (c) Order granting the foregoing motions.
3. On filing suit, request the court to set a date for hearing the motion.
4. Complete the notice by filling in the blanks, file the notice and motion, and have them served with the summons and complaint.
5. At the hearing, present the motion and have the order ready for signature.
6. If the opposing party is not present at the hearing, have a copy of the order delivered to him or to his attorney.
7. Take the deposition and inspect the documents. Ask the reporter to transcribe the deposition and file the transcript by a given date before the hearing.

B. Discovery at Hearing

In emergency situations, where there is no time for discovery before the hearing at which the defendant's records are to be used, plaintiff's counsel should have a subpoena *duces tecum* served on the defendant, requiring him to bring to the hearing the types of documents specified in the subpoena. At the hearing, plaintiff's counsel should examine the documents. If the documents serve the purpose for which they were subpoenaed, plaintiff's counsel should call the defendant administrator as an adverse party witness under Rule 43(b) and ask him the questions necessary to identify the records and explain how they are used in that part of the business. Counsel then should offer the records in evidence.

CHAPTER 15

SUMMARY JUDGMENT

I. Introduction

The material facts are undisputed in many migrants' cases. By moving for summary judgment under Rule 56, counsel for the migrants can obtain an early decision on all or some of the issues in such cases. Where there is no genuine issue of material fact, the plaintiffs are entitled to judgment as a matter of law.

As demonstrated by *Folgueras v. Hassle*, 331 F. Supp. 615 (W.D. Mich. 1971), where partial summary judgment was granted, summary judgment is particularly appropriate in cases of denial of access to labor camps. Although there are contested issues of law in an access case and there may be a controversy over whether, as the plaintiff claims, the defendant hit him several times and kicked him while he was down or whether, as the defendant claims, the plaintiff fell down unassisted while they were talking, there is no question that the defendant excluded the plaintiff from the labor camp. Summary judgment also may be sought in minimum wage cases where the amounts paid the plaintiff employee are undisputed. Summary judgement is available less often in cases arising out of contract claims, where the existence and terms of the contract are likely to be in dispute, or in cases of retaliatory firing or eviction, where the defendant usually will deny that his acts were retaliatory in nature.

Full or partial summary judgment has several advantages in migrants' cases. It can enable counsel for the migrants to litigate the case and obtain final relief without the migrants' incurring the expense of returning to the jurisdiction for trial. It can expedite a final decision or settlement. Even in cases where a plaintiff's motion for summary judgment is not granted, the motion can serve as a mutual discovery proceeding where the parties make extensive factual disclosures through affidavits, the court (under Rule 56(c)) clarifies and narrows the issues of fact and law in preparation for the trial, and, after assessing the merits of the case and the costs of trial, the defendant is encouraged to make an offer of settlement. (The risk that attaches to a motion for summary judgment in cases to be tried with a jury–that an order denying the motion before trial will prejudice the judge against the same party's motion for directed verdict during trial–is absent from cases for injunctive relief and other non-jury cases.)

Summary judgment procedure is covered in detail in Rule 56. Among other provisions, the rule requires the motion to be served at least 10 days before the date set for hearing (Rule 56(a)). The motion may be made with or without supporting affidavits (Rule 56(a)). The court usually will permit affidavits to be supplemented or opposed by depositions or answers to interrogatories (Rule 56(e)). In deciding the motion, the court may read the pleadings to determine the issues, but it should consider only the specific facts in the affidavits, depositions, exhibits, admissions, and answers to interrogatories to determine whether the issues are disputed. (Rule 56(e); *Scarboro v. Universal C.I.T. Credit Corp.*, 364 F.2d 10 (5 Cir. 1966); *Norton v. N. B. Fairclough, Inc.*, 72 F. Supp. 308 (D.N.J. 1945); *Ayers v. Pastime Amusement Co.*, 283 F. Supp. 773 (D.S.C. 1968)).

Because migrants are transient, counsel should take certain steps before they leave the jurisdiction to prepare for summary judgment in the migrants' favor and to defend against a motion for summary judgment that might be filed against the migrants by their opponents. The following sections outline the documents that should be prepared and the action that should be taken.

II. Summary Judgment in Favor of the Migrants

A. Documents

The following documents should be prepared or collected to obtain summary judgment in the migrants' favor:

1. Motion for summary judgment.
2. Affidavits by the plaintiff migrants and their favorable witnesses or transcripts of their depositions.
3. The defendants' answers to interrogatories, transcripts of the defendants' depositions, and any admissions by the defendant which support the plaintiffs' motion for summary judgment.
4. Any other exhibits to be referred to in the motion for summary judgment.
5. Memorandum of points and authorities.
6. Notice of motion, if required by local practice.

B. Procedures

1. Before the plaintiff migrants and their favorable witnesses leave the jurisdiction, obtain affidavits from them covering the facts of the case or obtain their depositions to preserve their testimony. (See Chapter 14, Discovery.) If at the time that the migrants are interviewed, counsel believes that a motion for summary judgment might be filed later in the case, he should outline the motion briefly and use the outline as a checklist of facts that must be covered by statements in one or more of the affidavits (or in the depositions). After the affidavits are written they must be signed and notarized.

2. If the testimony or admissions of the defendant are needed to establish that there is no material issue of fact to be tried, take the defendant's deposition or serve him with interrogatories as necessary to support the motion. Even if the defendant's testimony is not needed to support the motion, consider taking his deposition or serving him with interrogatories on all aspects of the case so he will be committed to a version of the facts which cannot be changed in an effort to create issues of fact after the motion for summary judgment is filed.

3. Prepare the motion and attach to it all of the affidavits, deposition transcripts, interrogatories and answers, admissions, and exhibits that are referred to in the motion. A statement of facts is not required in the memorandum, but it is a useful way to argue the case and pull together the evidence. If not, the same structuring should be done in the motion.

4. Prepare the memorandum of points and authorities and, if required by local practice, the notice of motion. A notice is needed in those courts where the moving party is required to determine the date on which the motion will be heard and to notify the opposing party. A notice is not needed in other courts where, after the motion is filed, the clerk determines the hearing date and notifies all of the parties or where the court decides such motions without hearing oral argument.

III. Defending Against a Motion for Summary Judgment Filed by the Migrants' Opponents

Any party may file a motion for summary judgment, and a defendant might place migrant plaintiffs at a disadvantage by filing such a motion after the migrants have left the jurisdiction and their counteraffidavits are not readily obtainable. At the outset of the case, counsel for the migrants should take the precautionary step of obtaining the affidavits or the depositions of the plaintiff migrants and the favorable witnesses before they leave the jurisdiction, in order to prepare to resist an adverse motion for summary judgment. Because the affidavits must contradict any motion that the opponents may file in the future, claiming that there is no genuine issue of fact to be tried, the testimony in the affidavits and depositions should cover all aspects of the case. Counsel should compare the facts in them against the allegations of the complaint for completeness, while there is still time to add to the affidavits and cover in the depositions any facts that otherwise might be overlooked.

If the opponents file a motion for summary judgment against the migrants when there are genuine issues of fact to be tried, counsel for the migrants prior to the date of the hearing should serve and file any affidavits in opposition, deposition transcripts defendant's admissions, defendant's answers to interrogatories, or other documents that show that issues of fact exist. However, if for good reasons counsel cannot obtain affidavits presenting the facts that justify the migrants' opposition to the motion, he should prepare and file his own affidavit stating his inability to do so and giving the reasons. Rule 56(b) provides that in such cases the court may deny the motion for summary judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

CHAPTER 16

SUCCESSFUL LITIGATION OF A CASE FOR MIGRANTS

Of the few civil suits that have been filed on behalf of migrants, only a handful have been litigated to a successful result. This chapter traces the history of one of those cases.

I. Procedural History Of the Hassle Cases

On July 22, 1969, Donald Folgueras, an employee of a migrant assistance agency, visited a migrant labor camp in southwestern Michigan to check the water supply for bacteria. Joseph Hassle, the grower who owned and operated the camp, discovered Folgueras there and violently ejected him. The next day Folgueras and a fellow employee, Violadelle Valdez, returned to take a child from the camp to a medical clinic. Before they could do so, Hassle ordered them to leave. When Folgueras refused, two local policemen arrested him at Hassle's request.

Folgueras was tried for criminal trespass in state court in October and was acquitted on a directed verdict at the close of the prosecution's case.

Folgueras, Valdez, and the Gutierrez family, migrant occupants of the camp, filed suit against Joseph and Harriet Hassle and the two arresting officers on July 6, 1970, in the United States District Court for the Western District of Michigan at Kalamazoo. Their complaint requested compensatory and punitive damages and a declaratory judgment establishing a right of access. All defendants filed motions to dismiss. In September attorneys for the Hassles took the plaintiffs' depositions. Thereafter, the plaintiffs served interrogatories on defendant Joseph Hassle and the two police officers.

While discovery was proceeding in the *Folgueras* case, the government filed a civil suit against Joseph Hassle in the same court on March 11, 1971. The complaint in *United States v. Hassle* grew out of several incidents in which the defendant had refused access to his 15 camps during the 1970 growing season. The government requested an injunction against further violence and denials of access to the camps.

On April 13 the Attorney General of the State of Michigan, responding to an inquiry from a state senator sympathetic to the migrants, issued an opinion that state law provides a right of access to camps where migrant agricultural workers and their families live. The Attorney General later sought and was granted leave to intervene as a plaintiff in *U.S. v. Hassle.*

Because the strawberry harvest was approaching and migrants were due to begin arriving in the area in the middle of May, the government, on April 30, filed a motion for preliminary injunction in *U.S. v. Hassle* to establish a right of access to all of the defendant's camps for the coming season. The motion was supported by five affidavits on behalf of persons and organizations whom the defendant had excluded from his camps in the spring and summer of 1970. (These affidavits, together with Joseph Hassle's counter-affidavit in opposition to the motion for a preliminary injunction, appear at the end of this book.) The Court ordered defendant Hassle to show cause why the plaintiff's motion should not be granted and scheduled a hearing on the motion and show cause order for May 18.

Meanwhile, on May 11 the Supreme Court of New Jersey decided *State v. Shack,* which was the first finding in any court that all residents of migrant labor camps have a right of access.

The motion for preliminary injunction in *U.S. v. Hassle* was tried before Judge Noel Fox on the morning of May 18 in a courtroom filled with growers, their families, and representatives of migrant groups. After the Court dispensed with opening statements the government offered its evidence. James Shrift, John Bowers, and Sister Betty LaBudie testified in support of the motion for preliminary injunction essentially as they had testified in their affidavits. During the recess that followed, settlement negotiations began which continued into the afternoon. Before the end of the day, the parties reached agreement on a consent order, which the Court signed, enjoining the defendant from interfering with access to his camps, pending the outcome of the lawsuit.

The defendant and other growers generally complied with the order, and the season passed without a repetition of the threats and violence that had characterized the 1970 harvest.

The private plaintiffs in the *Folgueras* case moved for partial summary judgment on May 28, requesting a declaratory judgment on the right of Folgueras and Valdez to enter camps and the right of the Gutierrez plaintiffs to invite and receive visitors there. The Court denied the defendants' motions to dismiss the complaint on June 9 and granted the plaintiffs' motion for partial summary judgment on June 30.

Negotiations during the summer produced a final consent order in *U.S. v. Hassle* and a settlement of the private plaintiffs' damage claims against the defendants in the *Folgueras* case. The Court's final opinion of September 7, 1971, granting partial summary judgment in *Folgueras* and approving the consent decree in *U.S. v. Hassle*, is reported at 331 F. Supp. 615.

II. Alternative Approaches to Litigation

The Hassle cases brought together a combination of private parties—both migrant camp residents and outsiders seeking the right to enter camps—with federal and state governments. Aided by the timely court opinion in New Jersey, they established a favorable rule of law that helped stop violence in rural Michigan.

The *Folgueras* case was based primarily on the rights of camp residents to have visitors and secondarily on the rights of outsiders to visit them. Since the case arose out of incidents that took place several months before suit was filed, Valdez, the Gutierrez family, and most of the favorable witnesses for the plaintiffs had left Michigan by the time the case came to trial. As an added complication, the plaintiffs' litigation budget was severely limited.

Accordingly, while preparing the case for a full trial, counsel for the plaintiffs sought opportunities to recover judgment without having to bring the plaintiffs and their witnesses to court. They obtained admissions from the defendants by interrogatories and filed a motion for partial summary judgment based on the interrogatories, a crew leader's deposition, and the plaintiffs' testimony at the deposition that had been taken on behalf of the defendants. After the Court granted the motion for summary judgment on liability, the plaintiffs prepared for trial on the damage phase of the case and successfully negotiated a cash settlement, disposing of the entire case.

U.S. v. Hassle was based primarily on the government's right to have its benefit programs serve the intended beneficiaries without interference by third parties. The case involved incidents that occurred in 1970. The government was able to locate and bring to court the persons who had sought and been excluded access to the defendant's camp. An expedited decision was felt to be important because the harvest season of 1971 was approaching when suit was filed.

With this in mind, counsel for the government investigated the case, filed an early motion for preliminary injunction, and went to trial. The motion was settled by agreement on a preliminary injunction. Later negotiations produced a settlement on a permanent injunction in broad terms.

The Hassle cases thus demonstrate two different approaches to the litigation of migrants' lawsuits, each adapted to the requirements of the plaintiffs in the particular case. Both approaches succeeded.

III. Contested Hearing Procedure

The technique of trying lawsuits before judges and juries and conducting contested hearings has to be learned through experience. The following is a skeleton outline of procedures to be followed in preparing and conducting a contested nonjury hearing.

A. Preparation

1. Opening statement

Always make an opening statement unless the judge prevents you from doing so. An opening statement gets your case before the judge in coherent form at the start of the case and helps him follow the evidence and arguments. In most cases the opening statement should consist entirely of facts, without law or argument. A good opening statement does not have to be long. The following is a simple outline of a plaintiff's opening statement suitable for a hearing on a motion for preliminary injunction.

1. Introduction. One sentence summary of what the case is about.
2. Parties. A short, fair characterization of the plaintiff and the defendant and the relationship between them.
3. How it happened. The story of the case, giving the events in chronological order and stating the facts fairly but from the migrants' point of view.
4. Basis of liability. A succinct statement of each of the defendant's acts or omissions which make relief necessary and appropriate.
5. Request for relief. A concluding sentence, "At the close of the hearing we will ask the Court to issue a preliminary injunction against the defendant."

2. Direct Examination of Plaintiff's Witnesses

The technique of direct examination has to be acquired through experience in questioning witnesses. Unless there is some compelling reason for a different order, the strongest witness should testify first, the second strongest witness should testify last, and the other witnesses should be in between.

If any of the witnesses need an interpreter, counsel should arrange for one in advance. The appearance and credibility of the interpreter himself will affect the weight to be given the testimony of the witness for whom he translates. Where possible, counsel should choose an interpreter who is not related to the parties or witnesses or otherwise directly interested in the case. An interpreter who has had courtroom experience should be preferred over one who has not.

3. Documents and Exhibits

Plan ahead to make effective use of any documents and exhibits. Obtain the originals. If subpoenas or notices to produce must be served in order to have the documents produced at the hearing, serve them well in advance of the hearing date. Decide through which witness's testimony each exhibit should be introduced and go over the necessary testimony with that witness before the hearing. Have each document in a separate manila folder in the courtroom so you can produce it instantly without fumbling or searching.

4. Preparation of Favorable Witnesses for Opponent's Cross-Examination

In your pre-hearing preparation, after you have discussed the direct examination with each witness, ask him the questions you anticipate he will be asked on cross-examination.

5. Cross-Examination of Adverse Witnesses

Determine which witnesses will testify on behalf of your opponent. Decide which ones to cross-examine. Determine before the hearing the objective to be achieved by each cross-examination. Cross-examination has two basic objectives: (1) to obtain testimony favorable to your case and (2) to discredit an opposing witness who has given damaging testimony.

6. Legal Argument

If you will have to argue law at the hearing, prepare that too.

7. Checklist or Agenda

Prepare a chronological schedule, checklist, or agenda of things to be accomplished the day of the hearing, including (1) final preparation, (2) activities at the hearing itself, and (3) things to be done afterward.

B. Hearing

Make sure that your witnesses and documents arrive at the courtroom on time.

When court opens, follow the agenda you prepared in advance, making any adjustments as required by the circumstances. The order of events often will be as follows:

1. Opening statements
    a. plaintiff
    b. defendant
2. Evidence in the form of testimony by witnesses and offers of exhibits
    a. plaintiff
    b. defendant

3. Argument
    a. plaintiff
    b. defendant
4. Court's decision
5. Drafting of findings of fact, conclusions of law, and order to be signed by the judge.

C. References

The following are recommended references for attorneys' use in preparing trials and contested hearings: Busch, *Law and Tactics in Jury Trials*, 4 volumes, (Indianapolis, Indiana, 1949: Bobbs-Merrill & Co.) and Goldstein & Lane, *Goldstein Trial Technique*, 3 volumes (Mundelein, Illinois, 1969: Callahan Co.) Both are excellent guides to nonjury and jury trial practice.

PART IV

FORMS

Form 1–Caption on Complaint–Rule 10(a)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ANYSTATE

ANY MIGRANT, ANY WIFE, and ANY CHILD, by Any Migrant, his father and next friend	)	
Plaintiffs	)	
vs.	)	Civil Action No. _____
ANY GROWER, and ANY OTHER OPPONENT,	)	
Defendants	)	

Form 2–Caption on Subsequent Court Papers–Rule 10(a)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ANYSTATE

ANY MIGRANT, et al.,	)	
Plaintiffs	)	
vs.	)	Civil Action No. _____
ANY GROWER, et al.,	)	
Defendants	)	

Form 3–Notice of Motion

(Caption)

NOTICE OF MOTION

Plaintiffs will appear before Judge _____, or any other judge who may be sitting in his place and stead, at the United States Court House in Anytown, Anystate, at _____ A.M. on (date), or as soon thereafter as counsel can be heard and move (describe motion). A copy of the motion is attached hereto.

(Or, the motion and notice can be combined in the same document by substituting instead of the last sentence, "The grounds for the motion are as follows," then stating the reasons for the motion. See Official Form 19, Federal Rules of Civil Procedure.)

_____
Any Lawyer

(Certificate of service of notice of motion)

Form 4–Certificate of Service–Rule 5(b)

CERTIFICATE OF SERVICE

I hereby certify that I served (name of document) on each of the other parties by mailing a copy in an envelope, postage prepaid, addressed to each of their attorneys of record (name and address of each attorney) this _____ day of _____, 1972.

_____
(Signature)

Form 5–Motion–28 U.S.C. § 1915

(Caption)

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

For the reasons stated in the attached affidavit, Plaintiff Any Migrant moves pursuant to 28 U.S.C. § 1915 for leave to commence this suit and to proceed *in forma pauperis* without being required to pay fees and costs or give security for them.

_____
Any Lawyer
(address and telephone)

Form 6–Affidavit–28 U.S.C. § 1915

(No caption is needed on this affidavit.)

STATE OF _____)
) ss:
COUNTY OF _____)

AFFIDAVIT

Any Migrant, being first duly sworn, deposes and says as follows:

My name is Any Migrant. I am the plaintiff in this case, which is an action to enjoin a grower and a crew leader from firing me from my job and evicting me and my family from the labor camp where we are living because I complained to them and to other people living in the camp about the flies and mosquitoes, the open piles of uncollected trash, the impure water, and the other unsafe health and housing conditions at the camp. I also request damages.

I believe I am entitled to the redress I am seeking in this case.

My family consists of myself, my wife, and our four children. We are farm laborers. We harvest crops. During the past _____ weeks my family and I have earned a total of $_____. Our expenses and debts during that period totalled $_____. Our only asset is a 1955 Ford car, which we drive from one job to another.

Our regular home is in Pharr, Texas. We have been traveling outside of Texas since (date), harvesting crops. We arrived in (County and State) on (date) to pick strawberries. When that job ends about (estimated date) we will travel to (place) to harvest pickles. We will need to continue to travel to work until about (estimated date) when we will return to Texas. Because we must travel to work we have extra expenses for gas, oil, auto repairs, and other living expenses, which prevent our paying court costs.

I am unable to pay the costs of this lawsuit or give security for them.

_____
Any Migrant

Subscribed and sworn to before me this _____ day of _____, 197_.

_____
Notary Public

Interpreter's Declaration

My name is Any Interpreter. I can read and speak both English and Spanish. I read the foregoing affidavit and the complaint in this case to Any Migrant, translating them from English into Spanish. When I finished reading them, he signed the affidavit voluntarily and swore to it.

_____
Any Interpreter

FORM 7–Order–28 U.S.C. § 1915

(Caption)

ORDER

On motion of plaintiff Any Migrant for leave to commence this suit and to proceed *in forma pauperis*, it is hereby

ORDERED that plaintiff Any Migrant be, and he is hereby, authorized to commence this suit and to proceed *in forma pauperis* without being required to pay fees and costs or give security for them.

_____
United States District Judge

Dated: _____

Form 8–Complaint in Access Case–Rule 8(a)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ANYSTATE

ANY MIGRANT, ANY CHILD, by Any Migrant, his father and next friend, and ANY OUTSIDER,	)	
Plaintiffs	)	
vs.	)	Civil Action No._____
ANY GROWER and ANY OFFICER,	)	
Defendants	)	

COMPLAINT

Plaintiffs allege as follows:

I. Jurisdiction

1. This is an action by migrant farmworkers and their families and by persons seeking to visit them at their homes in migrant labor camps for an injunction prohibiting the owner and operator of the camps and a police officer from interfering with access to the camps.

This Court has jurisdiction of this case by virtue of 28 U.S.C. § 1343(3),(4). Declaratory relief is sought pursuant to 28 U.S.C. §§ 2201, 2202.

II. Plaintiffs

2. Plaintiff Any Migrant is a migrant farmworker. His home is in Pharr, Texas. He is employed by defendant Any Grower to harvest crops on the defendant's farms in Anycounty, Anystate. While he is working in Anycounty he resides in the Any Labor Camp. Plaintiff Any Migrant sues on his own behalf and as father and next friend of Any Child.

3. Plaintiff Any Child is plaintiff Any Migrant's son. He is seven years old. He resides in the Any Labor Camp.

4. Plaintiff Any Outsider is a schoolteacher employed by the Anytown School District. He works in the migrant summer school program, which is operated with federal funds granted under the provisions of the Elementary and Secondary Education Act, 20 U.S.C. § 241 c. His duties include visiting migrant labor camps in Anycounty to inform parents and children about the summer school, filling out enrollment forms, and arranging for bus transportation from the camps to the school.

III. Class Actions

5. Plaintiffs Any Migrant and Any Child sue in their own behalf and, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all occupants of the Any Labor Camp. The class is so numerous that joinder of all members is impracticable. There are questions of law and fact common to the class. The claims of the plaintiffs are typical of the claims of the class. The plaintiffs will fairly and adequately protect the interests of the class. Defendant Any Grower has acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive and declarative relief with respect to the class as a whole.

6. Plaintiff Any Outsider sues in his own behalf and, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all persons who desire to visit the occupants of the Any Labor Camp. The class includes but is not restricted to employees of federal, state, local, and private nonprofit agencies and organizations, which promote the education, health, job training, or general welfare of migrant workers and their families. The class is so numerous that joinder of all members is impracticable. There are questions of law and fact common to the class. The plaintiffs will fairly and adequately protect the interests of the class. Defendant Any Grower has acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive and declarative relief with respect to the class as a whole.

IV. Defendants

7. Defendant Any Grower maintains farms and orchards in Anycounty, Anystate. He uses migrant farmworkers to harvest crops and to perform other farm labor from May through October each year. The defendant owns and operates the Any Labor Camp, where migrant workers and their families reside during the growing and harvest season. More than 100 persons now live in the camp, including approximately 20 children of elementary school age.

8. Defendant Any Officer is a police officer employed by Anycounty.

V. Facts

9. Any Labor Camp is near the defendant Grower's fields in an isolated rural area of Anycounty. There is no other transient housing available to defendant Grower's workers. The entrance to

the camp is separated from the nearest public road by more than 300 yards of private access road, which is owned by defendant Grower.

10. Pursuant to Acts of Congress the federal government has established programs of assistance to migrants, which are intended to provide education, food, health care, legal aid, and other services that are necessary to their welfare. Other state, local, and private agencies and organizations maintain programs which serve these same purposes.

11. From time to time representatives of such programs seek to visit the migrants in the Any Labor Camp to inquire into their needs, to acquaint them with programs for which they are eligible, and to help them obtain the benefits of the programs. In addition, friends and acquaintances of the migrants often come to visit the migrants in the camp.

12. On several occasions defendant Grower has interfered with such visits to the camp by harassing and attacking the visitors and threatening to have them arrested by Anycounty police.

13. On the evening of June 6, 1972, plaintiff Outsider entered the Any Labor Camp and spoke to several parents and children in the camp about the migrant summer school. While he was talking with plaintiffs Migrant and Child in their cabin, the defendants Grower and Officer arrived. The defendant Grower pulled Outsider out of the cabin and told him he didn't want any "do-gooders and trouble-makers" in the camp. Defendant Officer told Outsider to leave the camp and not to come back without Grower's permission.

14. Defendant Grower still refuses to permit Outsider or other representatives of the summer school to visit parents and children in the camp or to drive the school bus to the camp entrance to pick up children on school days. Defendant Grower continues to harass and threaten other visitors, including representatives of other programs of migrant assistance, who attempt to enter the camp to visit the persons living there.

VI. Violations of Law

15. The acts and practices of defendants Grower and Officer violate 42 U.S.C. § 1983 and the Fourteenth Amendment to the Constitution of the United States by preventing plaintiff Outsider and the members of the class he represents from visiting the Any Labor Camp, thereby depriving plaintiffs Migrant, Child, and Outsider and the classes they represent of their right to freedom of speech and their right to assemble peaceably.

16. The acts and practices of defendants Grower and Officer violate 42 U.S.C. § 1983, the Supremacy Clause (Art. VI, Cl. 2), and the Fourteenth Amendment to the Constitution of the United States by preventing plaintiff Outsider and the members of the class he represents from visiting the Any Labor Camp, thereby depriving plaintiffs Migrant and Child and the members of the class they represent of the benefits of federally supported programs of migrant assistance and state, local, and private programs that serve the same objectives, and preventing plaintiff Outsider and the members of the class he represents from making such benefits available to the persons for whom they are intended.

17. The acts and practices of defendants Grower and Officer, preventing plaintiff Outsider and the members of the class he represents from visiting the Any Labor Camp, deprive plaintiffs Migrant and Child and the members of the class they represent of their right of access and their right to receive and invite visitors, to which they are entitled as tenants of defendant Grower and as occupants of a migrant labor camp.

VII. Equity

18. There is an actual controversy between the parties. Plaintiffs and the classes they represent are suffering and will continue to suffer irreparable injury by virtue of the defendants' interference with access to the Any Labor Camp. Unless restrained, the defendants will continue to prevent persons from entering the camp to visit the occupants. Plaintiffs have no adequate remedy at law.

VIII. Prayer For Relief

WHEREFORE, plaintiffs pray as follows:

1. That this Court issue a declaratory judgment that the acts and practices of the defendants Grower and Officer in preventing plaintiff Outsider and the members of the class he represents from visiting the Any Labor Camp violate 42 U.S.C. § 1983 and the Fourteenth Amendment to the Constitution of the United States by depriving Migrant, Child, and Outsider and the classes they represent of their right to freedom of speech and their right to assemble peaceably.

2. That this Court issue a declaratory judgment that the acts and practices of defendant Grower and Officer in preventing plaintiff Outsider and the members of the class he represents from visiting the Any Labor Camp violate 42 U.S.C. § 1983, the Supremacy Clause (Art. VI, Cl. 2) and the Fourteenth Amendment to the Constitution of the United States by depriving plaintiffs Migrant and Child and the members of the class they represent of the benefits of federally supported programs of assistance and state, local, and private programs that serve the same objectives, and preventing plaintiff Outsider and the members of the class he represents from making such benefits available to the persons for whom they are intended.

3. That this Court issue a declaratory judgment that the acts and practices of defendants Grower and Officer in preventing plaintiff Outsider and the members of the class he represents from visiting the Any Labor Camp deprive plaintiffs Migrant and Child and the members of the class they represent of their right of access and their right to receive and invite visitors, to which they are entitled as tenants of defendant Grower and as occupants of a migrant labor camp.

4. That this Court issue a preliminary and permanent injunction prohibiting the defendants, their agents, employees, successors, and all other persons in active concert and participation with them from threatening, attacking, or otherwise interfering with any persons who seek access to enter the Any Labor Camp or who have entered the camp for the purpose of visiting the residents of the camp; from interfering with any Constitutional or statutory rights of the farmworkers and their families living in the camp; and from interfering with any Constitutional or statutory rights of persons visiting the farmworkers and their families living in the camp.

5. That this Court grant the plaintiffs such other and additional relief as justice may require, together with the costs and disbursements of this action.

_____

Any Lawyer
(address and telephone)

Form 9–Complaint in Retaliation Case–Rule 8(a)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ANYSTATE

ANY MIGRANT, ANY WIFE, and ANY CHILD, by Any Migrant, his father and next friend,	)	
Plaintiffs	)	
vs.	)	Civil Action No._____
ANY GROWER and ANY OFFICER,	)	
Defendants	)	

COMPLAINT

Plaintiffs allege as follows:

I. Jurisdiction

1. This is an action by a migrant farmworker and his wife and child for an injunction and damages against a grower who evicted the plaintiff family from their residence in retaliation for the farmworker's exercising constitutionally protected rights. Plaintiffs also seek an injunction against a police officer who assisted in the eviction.

This Court has jurisdiction of this case by virtue of 28 U.S.C. § 1343(3),(4). Declaratory relief is sought pursuant to 28 U.S.C. §§ 2201, 2202.

II. Parties

2. Plaintiff Any Migrant, his wife Any Wife, and their son Any Child are migrants. Their home is in Pharr, Texas. During the growing seasons for agricultural crops they travel from place to place while plaintiff Any Migrant works at farm laboring jobs. Since June 6, 1972, they have lived in the Any Labor Camp, Anycounty, Anystate, while plaintiff Any Migrant has worked harvesting strawberries on farms owned by defendant Any Grower. Plaintiff Any Migrant sues on his own behalf and on behalf of plaintiff Any Child.

3. Defendant Any Grower maintains farms and orchards in Anycounty, Anystate. He uses migrant farmworkers to harvest crops and to perform other farm labor from May through October each year. The defendant owns and operates the Any Labor Camp.

4. Defendant Any Officer is a police officer employed by Anycounty.

III. Facts

5. In January, 1972 in Texas, plaintiff Any Migrant was recruited for work on Any Grower's farm during the strawberry season. He was told to report to the Any Labor Camp in Anycounty,

Anystate on June 6. He and his family arrived at the Any Labor Camp that day and moved into a cabin there.

6. Any Labor Camp is near the defendant Grower's fields in an isolated rural area of Anycounty. There is no other transient housing available to defendant Grower's workers.

7. Any Labor Camp is located next to a swamp that is a breeding place for insects. It is congested with uncontrolled weeds and brush. It is strewn with debris overflowing the trash cans. There are no fire extinguishers or first aid equipment in the living area. Screens are missing from many of the cabins. The mattresses in most of the cabins are dirty. There are no separate toilet facilities for each sex. The common-use toilets have inadequate lighting and ventilation. They are unclean and unsanitary. They are in a state of gross disrepair. There are swarms of flies and mosquitoes throughout the entire camp, in the cabins, and in the common-use toilet facilities. The foregoing conditions violate the Anystate Department of Public Health housing rules for agricultural labor camps (cite rule numbers).

8. On June 8 plaintiff Any Migrant complained to defendant Grower about the unsafe and unhealthy conditions in the Any Labor Camp and asked him to improve the conditions. The defendant refused to do so.

9. On the evening of June 11, while plaintiff Any Migrant was meeting with other residents of the Camp in the Migrants' cabin to discuss complaining to local government health officials about the conditions in the camp, defendants Grower and Officer entered the cabin. Defendant Grower told plaintiff Migrant he was fired and ordered him to move out of the camp with his family by noon, June 12.

10. The dominant motive for defendant Grower's firing plaintiff Any Migrant and evicting the plaintiffs was retaliation for plaintiff Any Migrant's complaining to him about the unsafe and unhealthy condition of the camp and meeting with other camp residents to discuss complaining to government officials. Defendant Grower's acts in firing plaintiff Any Migrant and evicting the plaintiffs were intentional, willful, and malicious.

IV. Violation of Law

11. The acts and omissions of defendant Grower and defendant Officer violate 42 U.S.C. § 1983 and the Fourteenth Amendment to the Constitution of the United States, in the following respects:

a) They deprive plaintiff of his right to freedom of speech, his right to assemble with others peaceably, and his right to report violations of law to the government;

b) They deprive the plaintiffs of their right to be free from retaliation for plaintiff Any Migrant's having exercised his Consititutionally protected rights; and

c) They deny the plaintiffs due process of law.

12. As a result of defendant Grower's firing plaintiff Any Migrant, the plaintiff has lost wages he otherwise would have earned and his capacity to obtain work and earn wages in the future in Anycounty and the surrounding area has been impaired.

V. Equity

13. There is an actual controversy between the parties. Plaintiffs are suffering and will continue to suffer irreparable injury by virtue of the defendants' retaliatory firing and eviction. Plaintiffs have no adequate remedy at law.

Prayer For Relief

WHEREFORE, plaintiffs pray as follows:

1. That this Court issue a declaratory judgment that the acts and omissions of the defendant Grower and defendant Officer violate 42 U.S.C. § 1983 and the Fourteenth Amendment to the Constitution of the United States (a) by depriving plaintiff Any Migrant of his right to freedom of speech, his right to assemble with others peaceably, and his right to report violations of law to the government, (b) by depriving the plaintiffs of their right to be free from retaliation for plaintiff Any Migrant's having exercised his constitutionally protected rights, and (c) by denying the plaintiffs due process of law.

2. That this Court issue a preliminary and permanent injunction prohibiting the defendants, their agents, employees, successors, and all other persons in active concert and participation with them from evicting any of the plaintiffs from the Any Labor Camp summarily or in retaliation for plaintiffs' exercising their right to freedom of speech, their right to assemble with others peaceably, their right to report violations of law to government officials, or any other right protected by law.

3. That this Court issue a preliminary and permanent injunction requiring the defendant Grower to reinstate plaintiff Any Migrant to his job for the rest of the strawbery harvest season on the same terms and conditions of employment as existed before he was fired, and prohibiting the defendant Grower, his agents, employees, successors, and all other persons in active concert and participation with them from firing plaintiff Any Migrant in retaliation for his exercising his right to freedom of speech, his right to assemble with others peaceably, his right to report violations of law to government officials, or any other right protected by law.

4. For compensatory damages in favor of plaintiff Any Migrant and against defendant Any Grower in the amount of $3,000 and for punitive damages in the amount of $3,000.

5. For such other and additional relief as justice may require, together with the costs and disbursements of this action.

Any Lawyer
(address and telephone)

Form 10–Complaint under Fair Labor Standards Act–Rule 8(a)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ANYSTATE

ANY MIGRANT,	)	
	)	
Plaintiff	)	
	)	
vs.	)	Civil Action
	)	No._____
ANY GROWER,	)	
	)	
Defendant	)	

COMPLAINT

Plaintiff alleges as follows:

1. This is an action to recover unpaid minimum wages plus an equal amount as liquidated damages under the Fair Labor Standards Act of 1966, 29 U.S.C. § 201 *et seq.* This Court has jurisdiction of this case by virtue of 29 U.S.C. § 216(b) and 28 U.S.C. § 1337.

2. Plaintiff Any Migrant is a migrant farmworker engaged in the production of agricultural products for movement in interstate commerce. Plaintiff's employer, defendant Any Grower, maintains farms and orchards in Anycounty, Anystate, where he produces agricultural products for movement in interstate commerce.

3. Defendant has used more than 500 man-days of labor, as defined in 29 U.S.C. § 203(u), in a calendar quarter of the past year.

4. For working during the strawberry harvest on defendant's farm during June, 1972, the defendant paid the plaintiff at the piece rate of $0.72 per carrier of strawberries (approximately eight quarts), in violation of 29 U.S.C. § 206(a)(5), so that the plaintiff was unable to earn the minimum wage of $1.30 per hour.

WHEREFORE, plaintiff requests judgment against the defendant in an amount equal to the unpaid federal minimum wage for agricultural workers, plus an equal amount as liquidated damages, as provided by 29 U.S.C. § 216, and costs.

_____
Any Lawyer
(address and telephone)

Form 11–Complaint under Hill-Burton Act–Rule 8(a)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ANYSTATE

ANY MIGRANT,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action
	)	No._____
ANY HOSPITAL, an Anystate nonprofit corporation,	)	
	)	
	)	
Defendant	)	

COMPLAINT

Plaintiff alleges as follows:

1. This is an action by a poor person eligible for free or below cost hospital services under the Hill-Burton Act, 42 U.S.C. § 291, to remedy the unlawful denial of such services. This Court has jurisdiction of this case by virtue of 28 U.S.C. §§ 1331, 1332. The matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs.

2. Plaintiff is a citizen of Otherstate. He is a migrant farmworker. He is presently employed by Any Grower, harvesting crops in Anycounty, Anystate, at $1.30 per hour. He is responsible for the support of his wife and their six-year-old child. He is unable to pay for hospital or medical services.

3. Defendant Any Hospital is an Anystate nonprofit corporation. It maintains a hospital in Anytown, Anystate. The hospital building owned and operated by the defendant was constructed with the assistance of federal funds granted under the Hill-Burton Act, 42 U.S.C. § 291. As a recipient of Hill-Burton funds the defendant is obligated by 42 C.F.R. § 53.111 to furnish below cost or without charge a reasonable volume of services to persons unable to pay therefor.

4. On June 7, 1972, plaintiff had the following complaints: (describe symptoms). That date he applied for hospital care at the emergency room of defendant Any Hospital. Because the plaintiff had no medical or hospital insurance and was unable to pay in advance for hospital services, defendant's employees refused to offer him any care (or refused to admit him as a patient), though at that time the defendant Hospital had not performed its obligation under the Act and regulations to furnish a reasonable volume of services to persons unable to pay therefor.

5. As a result of the defendant's denial of hospital services, plaintiff is suffering and will continue to suffer irreparable injury. Specifically, the plaintiff has sustained (state the elements of the plaintiff's condition, if known, the disability, past and future pain and suffering, lost earnings, and impairment of earning capacity which the plaintiff has sustained, or which will occur unless the defendant is enjoined). The plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays as follows:

1. For a preliminary and permanent injunction requiring the defendant, its agents, servants, successors, and all other persons in active concert and participation with them to offer the plaintiff

without charge or below cost hospital care on a standard no lower than the standard of care applied to the defendant's other patients.

2. For compensatory damages in the amount of $ _____ and punitive damages in the amount of $ _____, together with the costs and disbursements of this action.

_____
Any Lawyer
(address and telephone)

Form 12–Complaint in Contract Case in State Court

IN THE LOCAL COURT OF HOMECOUNTY
STATE OF HOMESTATE

ANY MIGRANT,	)	
	)	
Plaintiff	)	
	)	
vs.	)	Civil Action
	)	No._____
OUTSTATE FIRM, a corporation,	)	
	)	
Defendant	)	

COMPLAINT

1. Plaintiff Any Migrant is a citizen of the State of Homestate.

2. Defendant Outstate Firm is a corporation incorporated under the laws of the State of Otherstate and having its principal place of business in Otherstate. Defendant maintains farms, orchards, and packing plants in Otherstate, where it grows, processes, and sells agricultural products. It uses migrant farm laborers to harvest its crops.

3. On or about January 12, 1972, at Hometown, Homestate, Outstate Firm, through its agent Outstate Recruiter, offered the plaintiff employment in Othercounty, Otherstate, starting on June 5, 1972, and lasting to the end of the strawberry harvest, as a farm laborer picking strawberries at a wage rate of $1.30 per hour. The plaintiff accepted the offer and agreed to report to the Outstate Labor Camp in Othercounty, Otherstate on June 6, 1972.

4. Plaintiff Migrant traveled from his home in Homecounty, Homestate, to Othercounty, Otherstate, and arrived at the Outstate Labor Camp on June 6.

5. When the plaintiff arrived at the camp, defendant's employees told him they had no record of an agreement with him and refused to assign the plaintiff to any work in their fields because all the laboring jobs were filled.

6. At all times plaintiff Migrant has been ready to perform his agreement with defendant Outstate Firm. The defendant continues to refuse to assign the plaintiff any work.

7. The plaintiff has incurred expenses in performing the agreement between himself and the defendant. As a result of defendant's breach of their agreement, plaintiff has lost wages he otherwise would have earned and has incurred additional expenses seeking other employment.

WHEREFORE, plaintiff prays for judgment against the defendant in the amount of $_____, and costs.

Any Lawyer
(address and telephone)

Form 13–Motion–Rule 4(c)

(Caption)

MOTION FOR APPOINTMENT OF
A SPECIAL PROCESS SERVER

Plaintiff Any Migrant moves for an order appointing John Jones, a competent person _____ years of age and not a party to this case, to serve the summons and complaint in this case. Emergency relief has been requested, so that prompt service of process is needed. The defendants live in a remote part of Anycounty and may be difficult to locate. John Jones is familiar with that area and will undertake to find the defendant and serve process on him immediately. If Jones is appointed a substantial saving in travel fees will result.

Any Lawyer
(address and telephone)

Form 14–Order–Rule 4(c)

(Caption)

ORDER

On motion of plaintiff for an order appointing John Jones to serve the summons and complaint in this case, it is hereby

ORDERED that John Jones be and he is hereby appointed to serve the summons and complaint on the defendants.

United States District Judge

Dated: _____

Form 15–Return of Service–Rule 4(g)

(Caption)

RETURN OF SERVICE BY SPECIAL
PROCESS SERVER

STATE OF _____)
) ss:
COUNTY OF _____)

John Jones, being first duly sworn, deposes and says as follows:

My name is John Jones. I live at (address).

On January 12, 1971 I was specially appointed by order of this Court to serve process in this case. On January 13, 1971 I served the summons and complaint in this case on Any Grower, defendant, by handing him a copy of each such document at (place). On January 13, 1971 I served the summons and complaint in this case on Any Other Opponent, defendant, by leaving a copy of each such document at his home (give address or location as explicitly as possible, not just a rural route number) with his wife, Mrs. Any Other Opponent.

_____
John Jones

Subscribed and sworn to before me this _____ day of _____, 197__.

_____
Notary Public

Form 16–Motion–Rule 65(a)

(Caption)

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs move for a preliminary injunction restraining the defendant Any Grower from firing plaintiff Any Migrant from his job or evicting any of the plaintiffs from the Any Labor Camp during the pendency of this suit, and from threatening the plaintiffs with firing or eviction.

The grounds for plaintiffs' motion are as follows:

1. This suit was filed to enjoin the defendant from firing plaintiff Any Migrant from his job and evicting him, his wife, and his child from the labor camp where they are living.

2. The defendant Any Grower owns and operates farms and orchards in Anycounty, Anystate. He uses the interstate recruitment system of the United States Department of Labor and the state employment services to recruit and employ migrant farmworkers to harvest crops and to perform other farm labor from (date) to (date) each year. Migrant workers and their families reside in his labor camps while they are working for him during that period.

3. Pursuant to the Wagner-Peyser Act, 29 U.S.C. § 49, the Secretary of Labor has established minimum health standards for housing facilities furnished farmworkers recruited and employed through the interstate system, 20 C.F.R. § 620.

4. The defendant recruited the plaintiff Any Migrant through the interstate system. The plaintiffs traveled from their home in Pharr, Texas, to Anycounty, Anystate. Since (date) the plaintiff Any Migrant has been employed by the defendant, and the plaintiffs have lived in the Any Labor Camp, which the defendant owns and operates.

5. The defendant has threatened to fire the plaintiff Any Migrant from his job and to evict him and his family from the Any Labor Camp in retaliation for his complaining to other camp residents and visitors that the Any Camp is infested with swarms of flies and mosquitoes, congested with uncontrolled weeds and brush, and strewn with debris that overflows the trash cans, that the housing units there are overcrowded and lack screens and interior partitions, that there are no separate toilet facilities for each sex, and that the common-use toilets have inadequate lighting and ventilation, are unclean and unsanitary, and are in a state of disrepair. All of the foregoing conditions violate the health and housing regulations standards issued by the Secretary of Labor under the Wagner-Peyser Act. On (date) the defendant Any Grower told Any Migrant that if he hears any more complaints about the camp he will fire Any Migrant and he and his family will have to move out of the camp. The affidavits of Any Migrant, Any Wife, and Any Witness are attached to this motion and filed in support of it.

6. Unless restrained, the defendant will continue to threaten to fire plaintiff Any Migrant from his job and to evict him and his family from the labor camp.

7. Plaintiff Any Migrant has no source of employment in Anystate other than defendant's farm. There is no other place where housing is available for himself and his family in Anystate other than the Any Labor Camp. Having relied on the defendant's agreement to employ him, plaintiff Any Migrant has incurred substantial expenses traveling to Anycounty, and unless he is allowed to continue to work at the defendant's farm he and his family will not be able to afford the expense of the return trip to their home in Texas. Unless the plaintiff Any Migrant can act to correct unsafe and unhealthy living conditions in the camp without fear of threats and reprisals, he will be unable to protect his own health and that of his family while they are living there, and he and his family will suffer immediate and irreparable injury. The plaintiffs have no adequate remedy at law.

_____

Any Lawyer
Attorney for plaintiff
(address and telephone)

Form 17–Memorandum–Rule 65(a)

(Caption)

MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Under the Constitution of the United States and the Wagner-Peyser Act the plaintiffs have a right to report violations of farm labor camp housing regulations and to act to obtain remedies for unhealthy camp conditions without retaliation or threats of retaliation. *Gomez v. Florida State Employment Service,* 417 F.2d 569 (5 Cir. 1969); *McQueen v. Druker,* 317 F. Supp. 1122, 1132, (D. Mass. 1970), *aff'd* 438 F.2d 781 (1 Cir. 1971); *Hosey v. Club Van Cortlandt,* 299 F. Supp. 501, 505-506 (S.D.N.Y. 1969).

Where the plaintiffs establish that they will suffer irreparable injury or that they are being denied a Constitutional right, a preliminary injunction should issue. *Henry v. Greenville Airport Commission,* 284 F.2d 631 (4 Cir. 1960), and cases cited.

Respectfully submitted,

_____
Any Lawyer
Attorney for plaintiff

Form 18–Order to Show Cause–Rule 65(a)

(Caption)

ORDER TO SHOW CAUSE

This case coming on to be heard on plaintiffs' motion for preliminary injunction against defendant Any Grower, and it appearing from the allegations of the Complaint, the motion for preliminary injunction, and the affidavits and exhibits attached thereto, that the plaintiffs are entitled to the preliminary injunction requested unless good cause to the contrary is shown, it is hereby

ORDERED, that the defendant Any Grower appear before Judge _____ , at the United States Court House in Anytown, Anystate, at 10:00 A.M. on _____ , 1972, and show cause, if any, why this Court should not issue a preliminary injunction as prayed for in plaintiffs' motion.

FURTHER ORDERED, that the United States Marshal serve copies of this order on the defendant forthwith, together with copies of the summons, complaint, motion for preliminary injunction, affidavits, and exhibits.

_____
United States District Judge

Dated: _____

Form 19–Application for TRO–Rule 65(b)

(Caption)

APPLICATION FOR TEMPORARY
RESTRAINING ORDER

Plaintiffs move the Court to issue forthwith a temporary restraining order against the defendant Any Grower immediately restraining and enjoining him from firing the plaintiff Any Migrant from his job or evicting any of the plaintiffs from the Any Labor Camp and from threatening the plaintiffs with firing or eviction pending further order of Court.

This motion is based on the plaintiffs' complaint, the motion for preliminary injunction, and the affidavits and exhibits attached thereto, all of which are incorporated herein by reference and made a part of this motion.

Any Lawyer
Attorney for plaintiffs
(address)

Form 20–Certificate–Rule 65(b)

CERTIFICATE UNDER RULE 65(b)

I certify that I telephoned the defendant Any Grower on (date) at (time) and told him I was going to apply for a temporary restraining order against him today. I also telephoned the office of the defendant's attorney, Any Defenseman, on (date) at (time) to notify him. His secretary told me he was out of the office on a fishing trip and would not return until (date). Further notice to the defendant and his attorney should not be required because the defendant probably will fire the plaintiff Any Migrant and evict him and his family before notice can be given and a hearing can be held, as set forth in plaintiffs' motion for preliminary injunction and the affidavits and exhibits attached thereto.

Any Lawyer

Form 21–TRO–Rule 65(b)

(Caption)

TEMPORARY RESTRAINING ORDER

This case came on to be heard on plaintiffs' application for a temporary restraining order pending hearing on plaintiffs' motion for a preliminary injunction, from which it appears to the Court that the defendant is about to fire the plaintiff Any Migrant from his job and evict all of the plaintiffs from the labor camp where they are living, as set forth in plaintiffs' complaint, motion for preliminary injunction, and affidavits and exhibits attached thereto, and that the defendant will carry out such acts unless restrained by order of this Court. It further appears to the Court that immediate and irreparable injury, loss, and damage will result to the plaintiffs before notice can be given to the defendant or his attorney and a hearing can be held on plaintiffs' application for a temporary restraining order and defendant or his attorney can be heard in opposition, in that the defendant by threatening the plaintiffs with firing and eviction in retaliation for the efforts of the plaintiff Any Migrant to remedy unhealthy and unsafe conditions at the Any Labor Camp, violates the plaintiffs' Constitutional rights and prevents the plaintiff Any Migrant from protecting the health of himself and the members of his family. Plaintiffs' attorney has certified to the Court in writing the efforts he has made to give notice and the reasons supporting his claim that notice should not be required.

It is hereby ORDERED:

1. Defendant Any Grower is hereby restrained from firing the plaintiff Any Migrant from his job or evicting any of the plaintiffs from the Any Labor Camp and from threatening the plaintiff Any Migrant or his family with firing or eviction.

2. This order shall expire at (time) on (date) unless before such time this order is extended for good cause.

3. Plaintiffs' motion for preliminary injunction is set for hearing on (date) at (time).

4. Copies of this order, plaintiffs' complaint, the motion for preliminary injunction, and the affidavits and exhibits attached thereto shall be served on the defendant Any Grower immediately by the United States Marshal.

_____
United States District Judge

Issued: (time and date)

Form 22–Notice–Rule 30

(Caption)

NOTICE OF DEPOSITION

The plaintiff will take the deposition of (witness's name and address) at 2:00 P.M. (date) at (place where deposition will be taken) before a notary public.

The witness has been served with a subpoena *duces tecum* for the deposition. A copy of the list of documents set forth in the subpoena is attached to this notice.

Any Lawyer
(address and telephone)

(Certificate of Service)

Form 23–Motion–Rule 30(a)

(Caption)

MOTION FOR LEAVE TO TAKE
DEPOSITION UNDER RULE 30(a)

Plaintiffs move for an order pursuant to Rule 30(a) of the Federal Rules of Civil Procedure granting them leave to take the deposition of Any Crew Leader on (date), a date prior to the expiration of 30 days after service of the summons and complaint upon the defendants (or, if one or more defendants *have* been served more than 30 days before the deposition, state the names of those who have *not*), for the following reasons:

1. This is an action for injunction and damages arising out of an occurrence on (date) when the defendant interrupted a visit by plaintiff Any Outsider to the Any Labor Camp by throwing him out of the camp.

2. Any Crew Leader saw the occurrence. He has records of the names of other witnesses to the incident, many of whom are migrants whose identities are unknown to the plaintiffs and who are due to leave this jurisdiction on or before (approximate date they will be leaving).

3. He has refused to disclose their names voluntarily to the plaintiffs or their representatives.

4. Unless the plaintiffs can take the deposition of Any Crew Leader, learn the names of the other migrant witnesses to the incident, and interview them before they leave, important evidence bearing on this case will be lost.

Any Lawyer
(address and telephone)

(If notice is served, add a certificate of service. If all defendants have entered their appearances by attorneys the certificate in Form 4 can be used. If not, the notice and motion should be served on the defendants themselves who have not yet appeared, and the certificate of service should say so.)

Form 24–Order–Rule 30(a)

(Caption)

ORDER GRANTING LEAVE
TO TAKE DEPOSITION

On motion by plaintiffs pursuant to Rule 30(a) of the Federal Rules of Civil Procedure for leave to take the deposition of Any Crew Leader, (due notice having been served,) and the Court, being fully advised, and being of the opinion that there is good cause for the taking of the deposition, it is hereby

ORDERED, that the plaintiffs are granted leave to take the deposition of Any Crew Leader on (date).

_____
United States District Judge

Dated: _____

Form 25–Notice–Rule 30(b)(2)

(Caption)

NOTICE OF DEPOSITION
UNDER RULE 30(b)(2)

The plaintiff will take the deposition of Any Witness (witness's address) at 2:00 P.M. (date) at (place) before a notary public. This notice is served on you pursuant to Rule 30(b)(2) of the Federal Rules of Civil Procedure. The witness is a migrant farmworker, who will be leaving this District on (date) and going more than 100 miles from (place of trial) to work on crops in (other place). From there he will be returning to his home at Pharr, Texas.

_____
Any Lawyer
(address and telephone)

(Certificate of Service)

Form 26–Motion–Rule 30(b)(4)

(Caption)

MOTION UNDER RULE 30(b)(4) FOR LEAVE
TO RECORD DEPOSITION TESTIMONY
BY NONSTENOGRAPHIC MEANS

Plaintiffs move, pursuant to Rule 30(b)(4), for an order granting them leave to record the deposition testimony of Any Witness by nonstenographic means, for the following reasons:

1. This is a suit for an injunction and damages arising out of an occurrence on (date) when the defendant evicted the plaintiff from the Any Labor Camp. Any Witness was present at the time and saw the occurrence. His deposition is scheduled to be taken on (date).

2. The plaintiffs are migrant farmworkers. They are proceeding *in forma pauperis* in this case. They have no money with which to pay a court reporter or stenographer's fees for attending the deposition or transcribing the testimony.

3. Plaintiff's counsel has arranged to borrow a mechanical tape recorder (describe make and model). It is in good working condition. If this motion is granted, plaintiff's counsel will record the proceedings at the deposition and immediately thereafter seal the tape in a box and deliver it to the Clerk for filing with the record in this case.

_____
Any Lawyer
(address and telephone)

(Certificate of Service)

Form 27–Order–Rule 30(b)(4)

(Caption)

ORDER

On plaintiffs' motion pursuant to Rule 30(b)(4) for leave to record the deposition testimony of Any Witness by nonstenographic means, due notice having been served and the Court having heard argument of counsel, it is hereby

ORDERED, that plaintiffs are granted leave to record the deposition testimony of Any Witness by tape recorder.

FURTHER ORDERED, that immediately after the deposition counsel for the plaintiffs will seal the tape in a box and deliver it to the Clerk for filing with the record in this case.

_____
United States District Judge

Dated: ____

Form 28–Notice–Rule 30(f)

(Caption)

NOTICE OF FILING DEPOSITION

The transcript of the deposition of Any Witness, which was taken on (date), was filed with the Clerk of the Court on (date).

Any Lawyer
(address and telephone)

(Certificate of Service)

Form 29–Notice–Rule 31

(Caption)

NOTICE OF DEPOSITION
ON WRITTEN QUESTIONS

Pursuant to Rule 31 of the Federal Rules of Civil Procedure, the deposition of Outstate Witness (address) will be taken on written questions on behalf of the plaintiffs before Outstate Notary, a notary public (address). A copy of the plaintiffs' list of questions to the witness is attached to this notice.

Any Lawyer
(address and telephone)

(Certificate of Service)

Form 30–Interrogatories–Rule 33

(Caption)

PLAINTIFFS' FIRST INTERROGATORIES
TO DEFENDANTS

Plaintiffs, pursuant to Rule 33 of the Federal Rules of Civil Procedure, request that each of the defendants answer the following interrogatories separately and fully in writing and under oath:

(Ask questions, numbering each one).

Any Lawyer
(address and telephone)

(Certificate of Service)

Form 31–Request for Production of Documents–Rule 34

(Caption)

REQUEST FOR PRODUCTION OF DOCUMENTS

Plaintiffs, pursuant to Rule 34 of the Federal Rules of Civil Procedure, request the defendants to produce the following documents, records, and data for inspection and copying by plaintiffs' representatives at the office of the defendant (address), Anytown, Anystate, at 10:00 A.M. August 1, 1972, and to respond to this request on or before July 25, 1972:

(List documents)

Any Lawyer
(address and telephone)

(Certificate of Service)

(NOTE: See also Official Form 24, Federal Rules of Civil Procedure)

Form 32–Request for Inspection of Land–Rule 34

(Caption)

REQUEST FOR INSPECTION OF LAND

Plaintiffs, pursuant to Rule 34 of the Federal Rules of Civil Procedure, request the defendants to permit them and their representatives to enter, inspect, and photograph the Any Labor Camp, (address), at 10:00 A.M. July 18, 1972, and to respond to this request on or before July 11, 1972.

_____

Any Lawyer
(address and telephone)

(Certificate of Service)

(NOTE: See also Official Form 24, Federal Rules of Civil Procedure)

Form 33–Request to Admit Facts–Rule 36

(Caption)

PLAINTIFFS' FIRST
REQUEST TO ADMIT FACTS

The plaintiffs, pursuant to Rule 36 of the Federal Rules of Civil Procedure, request that each of the defendants separately admit the truth of each of the following facts:

1. Defendant Any Company owns and operates the Any Labor Camp at (address).
2. Defendant Any Manager is an employee of Defendant Any Company.
3. The duties of defendant Any Manager include managing the Any Labor Camp.
4. The document attached to this request as Exhibit A is a full and accurate copy of (describe original document).

_____

Any Lawyer
(address and telephone)

(Certificate of Service)

(NOTE: See also Official Form 25, Federal Rules of Civil Procedure)

Form 34–Motion–Rule 56

(Caption)

MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, plaintiffs move for summary judgment in their favor and against the defendants on the issue of liability. The pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits attached to this motion, show that there is no genuine issue as to liability, that the defendants unlawfully interfered with the plaintiffs' right of access to the Any Labor Camp, and that the plaintiffs are entitled to judgment on liability as a matter of law, for the following reasons:

(Recite the pertinent facts in full, referring where appropriate to the affidavits, deposition transcripts, answers to interrogatories, and admissions.)

_____

Any Lawyer
(address and telephone)

(Certificate of Service)

Form 35–Motion to Retax Costs–Rule 54(d)

(Caption)

MOTION TO RETAX COSTS

Plaintiff Any Migrant moves the Court to review the taxation of costs made by the Clerk of this Court on (date) and for an order adding the following items, which were not allowed by the Clerk as costs.

_____

_____

_____

In support of the foregoing motion, plaintiff states as follows: (Give the reasons why the additional items should be allowed.)

_____

Any Lawyer
(address and telephone)

(Certificate of Service)

PART V

AFFIDAVITS IN AN ACCESS CASE

(Motion for preliminary injunction
in *United States v. Joseph Hassle*,
Civil Action No. K 26-71, W.D. Mich.,
May 18, 1971)

Affidavit 1–United States v. Joseph Hassle–Motion for Preliminary Injunction

AFFIDAVIT

STATE OF MICHIGAN)
) ss
COUNTY OF ISABELLA)

JAMES R. SHRIFT, being first duly sworn, deposes and says as follows:

I am Executive Director of United Migrants for Opportunity, Inc. (UMOI), a private non profit corporation. UMOI provides assistance to migrant and seasonal farmworkers and their families with funds from the United States Office of Economic Opportunity and Department of Health, Education, and Welfare under the Economic Opportunity Act of 1964, UMOI's principal office is at Mt. Pleasant, Michigan. We have seven other offices in the main areas of migrant concentration in the State of Michigan at Hartford, Adrian, Muskegon, Grand Rapids, Saginaw, Kalamazoo, and Lansing. The Hartford office serves Van Buren County and the southwestern corner of the State.

Each spring and summer, more than 50,000 migrant agricultural workers enter the State of Michigan with their families to harvest seasonal crops. While they are here most of them live in agricultural labor camps owned by the growers for whom they work. More than three-fourths of the migrants who come to Michigan each year are Mexican-Americans. Of this group, fewer than half are literate in any language. Most of the families earn less than $3,000 per year. They have no regular employment outside the migrant stream. Because of the increased use of machines to substitute for human labor in harvesting crops, migrants' prospects for continued employment in the migrant stream have become steadily worse.

UMOI assists migrants to settle out of the migrant stream by providing programs of adult basic education, cooperative vocational training, college scholarships, job placement, and housing and relocation assistance. But UMOI also assists migrants and their families to meet their immediate needs. We become aware of their needs through requests from migrants for assistance, through our own observation during visits with migrants, and through surveys which we conduct from time to time, such as the survey of migrant workers' housing conditions, which we made in the summers of 1969 and 1970. Most of the visits we make to migrant labor camps are made at the invitation of the residents of the camps. Some of the programs we conduct in Van Buren County each year during the growing season to serve migrants' recurring needs are Headstart, legal aid, the emergency food program, and assistance with food stamps. We also act on migrants' complaints and requests for help. To carry out these functions it is essential for our representatives to have access to migrant labor camps at reasonable times without interference.

The Headstart program is the only Experimental and Demonstration Migrant Mobile Headstart program in the country. It is funded by the Department of Health, Education and Welfare. Under this program we conduct classes in Texas during the winter, then move the classes north in the spring as the children and their families travel north in the migrant stream. That way, we maintain a continuity of educational, health, nutritional, and social services to the children on a twelve month basis. While they are in southwestern Michigan we need access to their labor camps to provide transportation for them from the camps to the summer Headstart center at Watervliet. As required by the terms of our grant from HEW we have a parent home visitor, who visits the children and Their families in their homes to find out their needs for health and nutritional guidance and assistance. Access to the camps is essential for him to do his job and for us to fulfill our contract with the government.

We began the legal assistance program last year by hiring 15 law students to work under the supervision of licensed attorneys and members of our staff. Three of the students were assigned to work in Berrien and Van Buren counties. They investigated migrants' complaints, advised them of their rights and responsibilities, communicated with government officials on the migrants' behalf, negotiated claims for migrants, filed court cases for them where necessary, and represented migrant defendants in misdemeanor cases. We intend to continue the legal assistance program this year with 20 law students, chosen from among 115 applicants from the law schools of the University of Michigan, University of Detroit, University of Notre Dame, and Wayne State University.

Many migrants need help obtaining food stamps and emergency food money immediately when they and their families arrive in the state. Often they have not worked for a long time, they do not know whether they are eligible for food stamp aid, they do not have money to buy the stamps, they do not know where to buy them, they have no transportation, or they need help taking all of the steps necessary to obtain food under the food stamp program. Though most migrants' earnings are low enough to make them eligible for food stamp aid, even when they are working in the growing season, the standards and procedures for food stamps vary from one state to another and in many countries within the State of Michigan.

UMOI helps migrants in Van Buren County obtain food assistance in the following ways: We contact migrants in the labor camps, ask them if they have enough food, and inquire into their other needs. If they appear to be eligible for food stamps, we tell them how to apply for them. In Van Buren County a migrant is required to obtain from the Department of Social Services a yellow card, containing a blank form for residence information to be filled in and signed by the grower for whom he works. If the grower refuses to fill in the yellow card or sign it, as sometimes happens, we notify the migrant that the Department of Social Services can waive the signature requirement under the proper circumstances. We encourage him to take the yellow card to the Department's office at Hartford and request the officials there to waive the signature requirement. If the migrant needs transportation to the Department's office in Hartford, we provide it. If the Department determines that a migrant is not eligible for food stamps where we believe the migrant is eligible, we make an appeal to the appropriate officials of the Department on the migrant's behalf. If at any time a migrant lacks money to buy food or food stamps, we provide assistance to him with funds granted to us by the Office of Economic Opportunity under the Emergency Food Program. During the period from May through October, 1970, we paid $156,117.00 to assist 6,341 migrant families in Van Buren and Berrien Counties under that program. Throughout the growing season we try to keep ourselves available through camp visits and at UMOI's Hartford office to give advice and assistance to migrants needing food aid.

Joe Hassle is a grower who employs migrant workers and operates labor camps near Keeler and Decatur in Van Buren County during the growing season. He has harrassed UMOI representatives on their visits to migrant laborers and their families who live in his camps. In the summer of 1969 he hit Donald Folgueras, a UMOI employee, as Folgueras was entering one of Hassle's camps, where six children had become ill, to take a sample of the water supply. In the summer of 1970 Hassle hit John Bowers, a law student employed by UMOI, while Bowers was visiting in one of Hassle's camps. Within a week after the Bowers incident I received two anonymous telephone calls at my office, threatening Bowers' life if I did not transfer him out of Van Buren County and warning me to stay out of Van Buren County myself. I transferred Bowers to another area of the State for his own safety, and I instructed UMOI personnel not to try to enter any of Hassle's camps for the rest of the year.

Unless Hassle is restrained from threatening, harassing, and attacking UMOI personnel our Headstart program will be interrupted; the legal assistance and food aid programs and all of the activities that assist migrants to settle out will be ineffective; and the lives and safety of UMOI

employees who seek to visit migrants in the camps will be in danger. A large number of migrants will be deprived of important Federally assisted services. Other growers in Van Buren County and elsewhere in the State of Michigan will be encouraged to use threats and force to prevent persons from entering labor camps to visit migrant workers and their families.

/s/ James R. Shrift

Subscribed and sworn to before me
this 29th day of April, 1971.

_____
Notary Public

Affidavit 2–United States v. Joseph Hassle–Motion for Preliminary Injunction

AFFIDAVIT

CITY OF WASHINGTON)
) ss
DISTRICT OF COLUMBIA)

JOHN BOWERS, being first duly sworn, deposes and says as follows:

I am a third year law student at the University of Michigan. I am currently studying at the Center for Law and Social Policy in Washington, D.C. I am receiving academic credit from the University of Michigan Law School for my work at the Center.

From May 15 to August 21, 1970, I was employed by United Migrants for Opportunity, Inc., (UMOI) as a student coordinator. After attending a training session at the University of Michigan, I was assigned to work for the summer in Berrien and Van Buren Counties, Michigan. My duties included informing migrant workers and their families of their legal rights and responsibilities while they resided temporarily in southwestern Michigan, carrying on a survey of migrant housing conditions which had been started the previous summer, and bringing to the attention of the appropriate public officials migrants' complaints regarding their housing, wages, welfare, or health conditions. My work was supervised by Edward Yampolsky, a licensed attorney and Director of Berrien County Legal Services Bureau.

In response to a complaint I visited one of Joseph Hassle's migrant labor camps on June 26, 1970. The camp, known as the "Home Camp", was located in Section 26 of Keeler Township in Van Buren County. I found the following conditions there: The camp was located next to a swamp that was a breeding place for insects. The camp was congested with uncontrolled weeds and brush. It was strewn with debris that had overflowed refuse receptacles. While I was there residents of the camp showed me several of the cabins. The housing units were overcrowded. There were no fire extinguishers or first aid equipment in the living areas. Screens were missing from many of the cabins. In most of the cabins the mattresses were dirty. There were no separate toilet facilities for each sex. The common-use toilets had inadequate lighting and ventilation. They were unclean and unsanitary. They were in a state of gross disrepair. They were located more than 200 feet from some of the cabins. There were swarms of flies and mosquitoes throughout the entire camp, in the cabins, and in the common-use toilet facilities.

I considered each of those condition to be in violation of Department of Public Health rules, and on June 30, 1970 I sent a letter to the Department, requesting them to make a new inspection of the Home Camp to verify the existence of these conditions. I asked them to take appropriate enforcement action.

On July 8 Andrew and Julia Hewitt, who worked for Joseph Hassle as laborers and lived in his Stienke Camp, invited me to come to their cabin to talk to them about whatever rights they might have under the Fair Labor Standards Act. The Stienke Camp was located on 92nd Avenue in Section 29 of Hamilton Township in Van Buren County, about six miles west of Decatur, Michigan. I drove to the camp that evening and arrived at about 7:00 P.M. The Hewitts' cabin was just a few feet from the road. I parked my Volkswagen car near their cabin and went in.

I had been talking with the Hewitts a little more than an hour when a neighbor came to the door and told Andy Hewitt that Joseph Hassle was outside in the camp and wanted to see him. Hewitt left the cabin. When he came back into the cabin Hassle was close behind him. I was standing inside the door. Hewitt tried to close the door before Hassle could enter but Hassle reached through the door, grabbed my shirt, pulled me out of the cabin, and began to scream at me and hit me. He asked me if I was the one who had written the letter to Lansing complaining about his camps. I said I had sent a letter about substandard housing conditions in his camps to the Van Buren County Health Department and a copy to the State Department of Public Health in Lansing. He hit me several more times after that. He threatened to kill me. He told me to get out of his camp. Then he asked me if the car parked near Hewitt's cabin was my car. I said, Yes. He had my car blocked with his truck so it could not be moved. He went to his truck, took a long iron pipe from the truck, walked to my car, and smashed out the windshield and all of the windows with the pipe. While he was smashing the car windows I got away in a car driven by a friend. Hassle was charged in the Seventh District Court at Paw Paw with malicious destruction of property. He pleaded guilty. [A certified copy of the judgment order, showing the guilty plea, was attached to this affidavit as an exhibit.] He paid the repair bill for my car.

After the incident at Hewitt's cabin James Shrift, the Executive Director of UMOI, transferred me to the Traverse City area and instructed UMOI's personnel not to try to go into any of Hassle's labor camps.

/s/ John Bowers

(Notary's jurat)

Affidavit 3–United States v. Joseph Hassle–Motion for Preliminary Injunction

AFFIDAVIT

STATE OF MICHIGAN)
) ss
COUNTY OF WAYNE)

JAMES C. HARRINGTON, being first duly sworn, deposes and says as follows:

I am a first year law student at the University of Detroit. I also teach Philosophy at the same school.

I have worked with the Catholic Church to help migrant farmworkers and their families for six years. The organization for which I have worked has been known since 1968 as Services for Migrant Farmworkers (SMF). Its purpose is to serve the spiritual, educational, economic, and social needs of migrant workers and their families. SMF is financed and operated by the Diocese of Lansing. Reverend Leo Taubitz, of Decatur, Michigan, is the Director of the program. (SMF is sometimes called the "Bishop's Committee" though it has no direct connection with the national Catholic organization that bears that name.)

During the summer of 1970, SMF conducted services for migrants in southwestern Michigan from two centers in Keeler and Berrien Springs. As coordinator I supervised the activities of the two centers and managed a staff of 15 full time workers and several unpaid part time volunteers. SMF intends to provide services for migrants in southwestern Michigan again this year.

As part of SMF's program two bilingual priests, Reverend Orozco and Reverend Capote celebrate Masses, hear Confessions, administer First Communions, validate Marriages, give religious instruction, and counsel migrants on their problems. They perform all of these services in the labor camps as well as at churches in Keeler and Berrien Springs.

Access to the camps is necessary for SMF to reach children and to reach persons who cannot leave the camps because they are ill or because they lack transportation. The means to perform religious services in labor camps are needed because the local churches cannot accommodate all of the Catholic migrants. Some of the procedures themselves are time consuming. For example, validating a marriage requires at least four visits with the priest for interviews, religious instruction, paperwork, and a ceremony in which documents are signed by the priest and the couple and their sponsors. Because the workers often work long hours every day, including Sunday, during the growing season, where SMF can enter the camps it can make religious services available to many persons who otherwise could not take the time to go to town for them.

In addition to its spiritual services SMF conducts other activities in the labor camps, including providing information on the availability of health care and welfare assistance, information on recreational activities for migrants, and transportation for persons attending educational programs such as the migrant education program that has been conducted at Keeler in the evenings by SMF and the Van Buren Intermediate School District. Its presence in the camps enables SMF to learn of migrants' emergency needs and to respond to them. On six occasions in 1970 SMF gave financial assistance to families who had to return to Texas before the end of the growing season because of illness or other difficulties.

To meet the needs of migrants and their families the priests and other representatives of SMF systematically visit agricultural labor camps on weekday evenings from 5:30 to 9:00 p.m. However, for the past six years Joseph Hassle has refused to permit SMF to conduct these regular activities in any of his labor camps. It is our custom at the beginning of each growing season to ask his

permission to visit the migrants in his camps. Most recently, in early June, 1970, I asked Hassle if SMF could come into his camps if we confined ourselves strictly to spiritual and religious activities. He refused his permission for us to enter any of his camps to visit the residents under any circumstances. His refusal prevented us from reaching many persons we otherwise would have served and prevented many Catholic migrants who worked for him and lived in his camps from obtaining the religious services that were available to residents of other growers' agricultural labor camps.

If Joseph Hassle can exclude SMF from visiting migrants living in his labor camps again this year, many migrant workers and their families will be deprived of religious services and other activities which SMF offers.

/s/ James C. Harrington

(Notary's jurat)

Affidavit 4–United States v. Joseph Hassle–Motion for Preliminary Injunction

AFFIDAVIT

STATE OF MICHIGAN)
) ss
COUNTY OF WAYNE)

SISTER BETTY LaBUDIE, being first duly sworn, deposes and says as follows:

I am a member of the order of Sisters of Saint Joseph. Our primary interests are in the fields of teaching, nursing, and social work. I teach at Gabriel Richard High School and live at the Gabriel Richard Convent in Riverview, Michigan.

I have done work to help migrant farmworkers and their families since 1968. In 1968, I served in Sodus, Michigan, with the Michigan Migrant Ministry, and in 1969, in the "Worker-Friend" Program of the Migrant Ministry in Croswell, Michigan. In 1970, I was employed by the Berrien County Health Department as a utility helper. My job was working with the migrant health clinic in Keeler and entailed, among other things, doing paper work, filing records, helping to make waiting patients comfortable, and providing transportation to the clinic, hospital, or other places if necessary. Also, I was told, although I do not remember by whom, to be on the look out for general unhealthy conditions when visiting camps and to report these to the health department.

During the summer of 1970, one of the families living in a camp owned by Mr. Joe Hassle was named Alvarez. One night the family came to the clinic to bring the youngest of their three children, a three year old boy named Alfonso, for treatment of a finger which he had injured earlier in the day. I was later told by a nurse that the doctor to whom he had been taken earlier had not been able to see him and had instructed his nurse only to bandage the finger. In any event, the nurse relayed instructions to me from the clinic doctor to immediately take the boy to Mercy Hosptial. I and Mrs. Alvarez went to the hospital leaving Mr. Alvarez at the clinic with the other two children

to wait for us. Alfonso was admitted as an emergency case and subsequently had part of his finger amputated.

While returning to the clinic, Mrs. Alvarez, who was pregnant, complained of feeling faint and having severe pains. When we arrived at the clinic, she was unable to go back into the clinic under her own power. Thus, a nurse came out to see her. The nurse then went back with Mrs. Alvarez to see the doctor who told the nurse to have me take Mrs. Alvarez back to Mercy Hospital. At this time, Mr. Alvarez went back to the camp to put the other two children to sleep.

Mrs. Alvarez was admitted to the hospital and later suffered a miscarriage. When we left her, she could tell us only that they lived in a Hassle camp but she did not know which one. The clinic had closed for the night, and I and Sister Mary Jane, who had gone with me, were not able to determine where the family lived.

The next morning, Sister Mary Jane and I considered it part of our job to find Mr. Alvarez and advise him of his wife's and son's conditions. We looked in vain for nearly two hours, and then saw a white man standing with several Chicano workers next to a packing plant. We stopped, introduced ourselves, and explained our problem. The white man then identified himself as Joe Hassle and told us that he did not want us in any of his camps. He then went on to talk for close to an hour stating, among other things, that Alvarez would have sought the information on his own if he were really interested, that he would hate to see a nun and a nurse (He did not realize that Sister Mary Jane and I were both nuns) in jail but would resort to that or any other necessary means to keep us out of his camps, and that he would fire all of the workers in any camp in which he saw us. He did not raise his voice, but spoke in a strong adamant tone which, together with our knowledge of his past uses of violence or threats of violence, convinced us that we should then leave without making any more effort to find Alvarez. His final comment to us was that "do-gooders" should leave the migrant people alone, that they are happy the way they are, and that they did not need people coming in to tell them about their living conditions.

We tried to get permission from all growers before going into their camps, but this was not always possible. To the best of my knowledge, there was no one place to find Mr. Hassle to ask his permission.

Further deponent sayeth not.

/s/ Sister Betty La Budie

(Notary's jurat)

Affidavit 5—United States v. Joseph Hassle—Motion for Preliminary Injunction

AFFIDAVIT

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

JUAN ARMANDO SAUCEDA, being first duly sworn, deposes and says as follows:

I am employed by the Lansing, Michigan, School District as a home-school visitor in the Migrant Education Division. In the spring and summer of 1970 I worked for the Dowagiac School District, recruiting children for the migrant summer school that was held at Sister Lakes Elementary

School in Sister Lakes, Michigan. The school was supported by funds from the United States Department of Health, Education, and Welfare. It consisted of kindergarten and grades 1-6. The school program was prepared to serve 300 children, the number we estimated would be living in labor camps within our district during the growing season. However, our average daily attendance was only approximately 125 to 148 children.

My duties included visiting migrant labor camps in Van Buren and Cass Counties to inform parents and children about the summer school, encouraging parents to permit their chilren to attend, filling out enrollment forms, and arranging for bus transportation from the camps to the school. When I began work in June, Jose Gongara, an employee of the Van Buren Intermediate School District, helped me become acquainted with the area served by the Sister Lakes School's migrant education program. We drove to the various growers' migrant labor camps. Gongara introduced me to persons he knew who lived or worked there.

One of the growers, Joseph Hassle, had 12 agricultural labor camps in the territory covered by the Sister Lakes School's program. I estimated that there were from 150 to 175 children of elementary school age in his camps during the growing season last year. One of his largest camps was located on 92nd Avenue. One day, as Gongara and I were on our way to see that camp, we passed Hassle's house at 62nd Street and 90th Avenue. A packing shed was located behind the house. Gongara saw some Mexican-American workers he knew standing near the packing shed. He told me to stop at the edge of the road near the shed. Before either of us could get out of the car, a man walked up to the door on the passenger's side, put one hand in through the window, grabbed Gongara's shirt and put his other hand in his pocket, pulled out a knife, opened it, and held it up to Gongara's throat. He called us "do-gooders". Gongara told him I would be recruiting children for the migrant school. Gongara told me the man at the car window was Joseph Hassle. Hassle told us he didn't want any do-gooders on his property. He released Gongara and put away his knife and we drove off.

Some time after that incident with Joseph Hassle Gongara and I told Paul Woodley, the Director of the Migrant Education Program at Sister Lakes, about it. We told Woodley that Hassle refused to let us go to his camps to recruit migrant children for the school. Woodley drove with us to Hassle's house to talk to him. We got out of the car. Hassle was near the packing shed. Gongara introduced Woodley to Hassle. Woodley began to tell Hassle about the migrant education program. He told Hassle that we were interested only in contacting the children in the camps and taking them to the school. He said it would be to Hassle's advantage to have the children in school during the day while their parents were working. Hassle said he didn't want to hear about the program and he didn't want anyone going into his camps. Woodley, Gongara, and I left. We drove back to the school office. After we left Hassle's place that day Woodley told us not to try to go into any of Hassle's camps.

After that I contacted as many migrant parents as I could, who lived in Hassle's camps. I saw them when they were in town at the laundromat or at the store. I tried to persuade them to take their children each morning to a place on the country road where our school bus could pick up the children without having to enter Hassle's property and without driving on his private camp access roads. But none of the parents in Hassle's camps brought their children to meet the bus.

I saw Joseph Hassle a third time when I drove to his house on a Sunday. I parked the car at the road, got out, and walked toward his house. He was just driving out of the driveway in his pickup truck as I arrived. He stopped and asked me what I wanted. I told him I just wanted his permission to go into his migrant camps to recruit children for the school and to take them to school in the bus. I said that was the only reason we wanted to go into the camps. Hassle had a shotgun beside him in the cab of the pickup truck. He patted the shotgun and said if he ever found me in any of his camps he would use the shotgun on me.

That was the last time I spoke with Joseph Hassle. After the incident in which Hassle attacked John Bowers, I stopped trying to see Hassle to persuade him to give us permission to visit migrants in his camps.

None of the children from any of Hassle's camps attended the migrant education program at Sister Lakes School during the growing season last year.

/s/ Juan Armando Sauceda

(Notary's jurat)

Counter-Affidavit–United States v. Joseph Hassle–Motion for Preliminary Injunction

AFFIDAVIT

STATE OF MICHIGAN,)
) ss
COUNTY OF BERRIEN)

Joseph Hassle, being first duly sworn, deposes and says as follows:

1. That he is Defendant in the above action and makes this Affidavit in support of his Answer to Motion for Preliminary Injunction.

2. That he resides on a farm located in Van Buren County, Michigan; that he has been married eighteen years to Harriet Hassle, his wife; that he has seven children ranging in age from 14 to 1; and that he has farmed in this same area in excess of twenty years during all of which time he has had no difficulty whatsoever with state or public officials or any of his employees until the matters hereinafter set forth occurred, which were entirely attributable to the activities of the organizations named in the Motion for Preliminary Injunction. (See letter of Van Buren County attached).

3. That with reference to the Affidavits attached to said Motion for Preliminary Injunction and with reference to the Affidavit of James R. Shrift, in particular, he states as follows:

That of the migrants working at his camp, at least 75% of them are literate and that many of the families earn between $3,000.00 and $4,000.00 working at his camps in the period between May 1st and August 31st alone and that in the case of at least one family of three people they earned $7,000.00, in such period. That many of the migrants are regularly employed in Texas as bakers, electricians, well-drillers, carpenters, and factory workers and they take leave of these jobs in Texas so that their family can work as migrants in Michigan at more profitable wages for the family than they earn throughout the year at regular employment in Texas. That the main reason for the increased use of machines as a substitute for human labor is primarily the activities of government agencies and other groups named in the Motion, making it uneconomical for the growers to employ migrant labor. That UMOI assistance in settling migrants outside the migrant stream is contrary to the Act of Congress creating the programs and the activities of UMOI as they have been administered in Michigan have been detrimental to the welfare of the migrants, the growers and the public generally. Insofar as he is aware, no migrants have requested or invited any UMOI employees to visit them in their camps and that as a result of UMOI activities in Van Buren

County in the years 1969 and 1970, migrants were securing food stamps, aid and assistance at the same time they were wiring money home and migrants were refusing to work on the 1st and middle of the month when food stamps were available for distribution and migrants were urged and coerced into demonstrating for Caesar Chavez's grape boycott and were entertained at parties where they were encouraged to hang him (Hassle) in effigy and plots and threats on his life were made and attempted, all as a result of the agitation of UMOI employees and other groups named in this Motion for Preliminary Injunction. During this past year two of his barns, a garage and a house for migrants were burned down to the ground, all attributable in his opinion to the activities of these groups in inciting the migrants against the growers.

That with reference to the so-called "Head Start Program", the majority of the migrant children attending his camp attended school in Texas during the winter months and the children (with their parents' support) were not desirous of continuing to go to school during the summer months and, further, the program administrators would hire his workers as aides notwithstanding the fact that such workers would continue to live in his camps but refuse to work for him. Because of these activities and the difficulties and unrest generated among the migrant workers and the impact on their efficiency, he denied access to his camps by these groups during the summer of 1970 for the first time. In previous years he had always favored the educational program for those employees who wished to benefit by it.

With reference to legal assistance, the migrants were told that they did not have to vacate the migrant camps when they were requested to do so by the owner-grower notwithstanding that they were not paying any rent or working for the grower and on other occasions they were counselled not to work for the grower and told that the growers were taking advantage of them.

With reference to assistance in obtaining food stamps, these same employees knowingly assisted migrants in securing food stamps that they were not entitled to. At the same time the migrants were refusing to work notwithstanding that work was available. Furthermore these employees of private agencies were squandering taxpayers' money and making advances to the migrants for transportation while many of the migrants had been wiring money home for deposit to their own savings accounts. Most migrants' earnings were more than adequate to place them in a category if they had not refused to work where they would be ineligible and should be ineligible for food stamp aid.

Notwithstanding the allegation contained on page 4, of the Shrift Affidavit, "Throughout the growing season we try to keep ourselves available through camp visits and at UMOI's Hartford office to give advice and assistance to migrants needing food aid." it is common knowledge that the migrants go to town on Saturday and Sunday where the UMOI office is located in Hartford, Michigan. On both of these days when migrants traditionally go to town, the UMOI office is closed because it is the practice to close government offices on Saturday and there would be no necessity to enter migrant camps if they were to maintain office hours when the migrants traditionally go to town. (Pages 280, 281, and 282, deposition of Violadelle Valdez, taken September 29th, 1970, in Court Action Civil No. 252, Donald Folgueras, et al, Plaintiffs, vs. Joseph W. Hassle, et al, Defendants.)

With reference to the summer of 1969 when it is alleged that he struck Donald Folgueras, a UMOI employee. Affiant Hassle stated that Donald Folgueras had entered his camp and was causing dissension between the migrant and the crew chief to the point where the crew chief advised him (Hassle) that he would severely injure Donald Folgueras if Joe Hassle did not keep him out of the camp. On being told this, Affiant told the crew chief leader not to get himself in trouble; that he, Joe Hassle, would personally see that this individual stayed out of the camp and he advised Donald Folgueras to stay out of the camp, although at that time Mr. Folgueras did not identify himself nor did he advise Mr. Hassle that he was working for UMOI but falsely claimed he was employed by the

Michigan Health Department. Notwithstanding Mr. Folgueras being advised and told not to come on the premises and that if he did he would be subject to possible physical assault if he were to return, the very next evening Mr. Folgueras, with somebody else who did not identify herself, went into the camp and again was found talking to the migrants. Affiant did strike him after which he called the Sheriff. Folgueras continued to adamantly refuse to leave the premises or to identify the organization he worked for, whereupon he was arrested by deputy sheriffs for Van Buren County.

With reference to the summer of 1970, Deponent denies under oath that he ever struck John Bowers and that on the occasion in question John Bowers was in a migrant camp and your Affiant did grab John Bowers' shirt and pull him out of the cabin and tell him to leave the premises. Your Affiant has no knowledge of any anonymous telephone calls threatening Bowers' life and states under oath that at no time did he make any telephone calls threatening Bowers' or anyone else's life but states that on many occasions he received threats to his life.

Affiant further alleges that "Head Start Program" will not be interrupted unless he is restrained from threatening or harassing UMOI personnel since the reason for the "Head Start Program" not functioning as desired is largely due to the lack of interest in the same by the migrants whose children have already in the majority attended school throughout the winter.

Your Affiant further alleges that programs administered by government employees which will truly assist migrants who need such assistance can be adquately pursued without the necessity of any court order in the premises and that no migrants will be deprived of benefits to which they are entitled by reason of the refusal of this Court to order the injunction prayed for.

With reference to the Affidavit of John Bowers and in response to matters claimed on page 2 of his Affidavit, your Affiant alleges that virtually all of Keeler Township in Van Buren County is located in a swampy area and this is true not only of the camps but your Affiant's home as well as many of the homes of other growers. Your Affiant denies that the camp in question was congested with uncontrolled weeds and brush and that if any debris were in the camp, it was as a result of the migrants not properly placing the debris in receptacles furnished for this purpose, which receptacles are regularly picked up and emptied. Your Affiant further states that at the opening of the camp at the beginning of the season, there were fire extinguishers and first-aid equipment in the living areas. If, in fact, these were missing, it was because they were taken or stolen by other persons. If, in fact, screens were missing from many of the cabins, it is because they were knocked out after the camp was opened. He denies categorically that there were not separate toilet facilities for each sex or that the toilet facilities had inadequate lighting or ventilation and that the camp was inspected by persons trained and knowledgeable in public health and met all of the standards of the State of Michigan prior to opening and none of the toilet facilities were located more than 100 feet from the cabins. By law they are required to be located a minimum of 50 feet from the cabins.

With reference to the matters alleged on page 3 of the Affidavit of John Bowers, your Affiant states that the crew chief for the laborers of the group which included Andrew and Julia Hewitt, who were the only two non-Mexicans in the group, believed the Hewitts were working for UMOI. The crew chief indicated this to your Affiant and he concluded this because he was aware of the frequent visits to them by John Bowers and of the further fact that they did only minimal amount of farm work and whenever they went out in the field, they constantly complained and counselled the other workers to refrain from working. The crew chief was under the impression that these two individuals were college students rather than bona fide migrant workers and your Affiant agreed because he knew of three other girls who claimed to be UMOI employees in one of his other camps. That on the occasion alleged on pages 3 and 4 of said Affidavit, your Affiant admits that he grabbed the shirt of John Bowers after he had asked John Bowers what he was doing there and John Bowers had told him it was none of his business. Your Affiant further denies that he struck John Bowers at any time upon this occasion or any other occasion. He further denies that he threatened to kill John

Bowers on this occasion or any other occasion. He admits that he told John Bowers to get out of his camp because John Bowers was telling the migrants that they should not work for him; that they should go up north and pick cherries in Traverse City instead; that Hassle was unfair to the migrants and at the time John Bowers was telling this to the migrants, it was false and Hassle knew it was false and that there was no work for them in Traverse City. In his opinion, at the time Bowers was doing this maliciously to create unrest and bitterness among the migrants. Your Affiant admits that on the occasion in question he was enraged at John Bowers because of these activities in interferring with his work crews and in misleading the migrants and that he did lose his temper and smashed the windows of John Bowers' car and that afterwards he did plead guilty to malicious destruction of property and paid the repair bill for the windows of the car.

Your Affiant further states that at this time, although John Bowers did complain to the public authorities about the damage to his car, he did not make any complaint predicated on any assault or battery or based on any claim that he was struck by your Affiant.

5. With reference to the Affidavit of James Harrington, Your Affiant says that 90% of the migrants, through their own choice, do not go to the Catholic Church and he denies that the local churches cannot accommodate all of the migrants who wish to attend services. Insofar as any marriage ceremonies are concerned, your Affiant states that he has never denied the facilities of his camp for purposes of performing any marriage service inasmuch as the same has never been requested and he is well aware that if he were to attempt to prevent this, he would lose his entire crew of workers. He further states that he has never required any of his migrant workers to work on Sunday if they did not choose to do so and that by choice approximately 65% of the migrants do work on Sunday when work is available and that he has never prevented and never would prevent any migrant desiring to attend church services either on Saturday evening or Sunday, regardless of the work, to attend such service.

With reference to page 3 of the Affidavit of James C. Harrington, your Affiant admits that for the past six years he has refused to permit representatives of the Catholic Church to conduct any activities in his camps for the reason that six years ago a Catholic priest who ostensibly was conducting a religious service was in fact telling the workers that your Affiant was no good, that they should not work for him, that they should move off the farm and refuse to work for him. That upon learning of this from the migrant, since he did not know it, because the service was being conducted in Spanish, he immediately approached the priest involved and advised him that he and the representatives of his organization would no longer be welcome in his camps and he has consistently refused to allow representatives of the Catholic Church to enter his camps notwithstanding the fact that he, himself, is a Catholic and attended church regularly every Sunday throughout his adult life up until this incident. Your Affiant denies that any families or migrant workers desiring to attend religious services will be deprived of same as a result of your Affiant excluding representatives of the SMF from his camps.

With reference to the Affidavit of Sister Betty LaBudie, your Affiant remembers the incident of attempting to reach Mr. Alvarez. He denies that he refused to give permission to these people to look for Mr. Alvarez on the occasion in question and denies that he ever stated that he would fire all of the workers in any camp in which he saw them. In support of this denial, he points out that he would have no right to fire the workers since he was under contract with the crew chief for this labor rather than the individual workers. He recalls that he advised the nuns that he could not understand why Mr. Alvarez was not more interested in determining the whereabouts and condition of his wife and child. He further advised them that they could go into any of his camps and he further recalls that he attempted for the better part of a day to find the individual involved and left word with all of the crew chiefs that they were attempting to locate Mr. Alvarez on this occasion in question.

6. In regard to the Affidavit of Juan Armando Sauceda, your Affiant states that up until the year 1970 he favored the migrant school program and some of the migrant children did attend school from the camps in the year 1969 and that he never, at any time, prevented or prohibited any of the migrant children who wished to attend the school from going to school in the year 1970. He further states that a majority of the migrant children attend school for 9 months in Texas where they live and that they do not wish to go to school during the summer months, nor do their parents want them to go to school but prefer to have them work with them.

In the year 1969 the Dowagiac School District hired one of his migrant employees as an aide and this individual continued to live in one of his camps, rent free, notwithstanding that she was not doing any work for him.

Your Affiant further states that with reference to the Affidavit of Sauceda and in particular, on pages 2 and 3, he recalls the incident alluded to in connection with Jose Gongara and alleges the fact to be that he is a very good friend of Jose Gongara and that on the occasion alluded to he recalls Gongara coming by his home as a passenger in a car with another man and that on that occasion he did in the context of horseplay reach in and grab Gongara's shirt; that afterwards Gongara got out of the car and walked over to him and he then took his pocket knife out of his pocket and waved it in the air, all of it in a kidding fashion and that he and Gongara talked for some time afterwards.

On May 5, 1971, after the Affidavit in this cause was served, he undertook to seek out Jose Gongara, who is now an employee of UMOI and on this occasion Gongara's immediate superior in UMOI at the Hartford office was with him in the labor office in Keeler. While an employee of the labor office in Hartford, one Palmer Beebe, engaged Gongara's employer in conversation, your Affiant talked with Gongara about this specific incident and Gongara acknowledged that he knew that Joe Hassle was kidding, that he was not threatened nor was he ever aware of Joe Hassle ever threatening anyone with a knife and in particular on this occasion. It was entirely in the context of horseplay and friendly interchange and that when he got back in the car with Sauceda, Sauceda commented, "He is quite a character, isn't he?" so that Gongara was of the opinion that Sauceda also was well aware that this was horseplay rather than any threat and that he, Gongara, would be glad to execute an affidavit to this effect if he could get away from his boss in UMOI. Gongara on this occasion further stated that UMOI was sending him to Texas because one of the crew chiefs in the area had threatened to kill him because Gongara had complained to the authorities that this particular crew chief was cheating his workers out of their rightful wages.

With reference to the other matters in the Affidavit, your Affiant admits that in the summer of 1970, because of the extreme unrest and turmoil among the migrants as a result of the activities of these many individuals and organizations, he had told all of them that for this year he did not want any of them going into the camps until things quieted down. At no time during this year, did any of the migrants or the crew chiefs ever indicate a desire or interest in sending their children to school.

With reference to the incident alluded to on page 4, Affiant categorically denies any threat being made by patting his shotgun or ever saying that he would use his shotgun on Sauceda.

7. By way of further explanation, your Affiant says as follows: That he has been hiring migrant labor crew chiefs for over 15 years and that up until the last 2 years this has been a mutually profitable and cordial relationship between himself, his family, the crew chiefs and the migrants, that the universal practice is to make the housing facilities in the migrant camps available and the crew chiefs undertake the assignment of cabins and by and large, assume responsibility for conduct of migrants within the camps. All of these camps are licensed by the State of Michigan under rules of the Michigan Health Department and health department officials have at all times been permitted access to these camps for purposes of checking them and licensing same at any and all times throughout the year. He has at all times attempted to comply with all of the regulations of

the Michigan Health Department throughout this period. The migrant workers are not required to live in these camps as a condition of working on his farm and frequently they do not live in his camps when they work in his fields. No rent is charged to the migrants or the crew chief and none of the camps have any stores, church or any public-type buildings but consist solely of migrant cabins, separate toilet facilities for each sex and shower room facilities as required by the Michigan Department of Health. The cabins are also furnished with stoves, refrigerators and beds but there are no municipal-type facilities nor public ways.

In the years prior to 1969 and 1970, other than the incident involving the Catholic priest which has already been alluded to, there was never any occasion to exclude any invitees of the migrants to these camps and the relationship between grower, crew chief and migrant was friendly and cordial.

Starting in the year 1969 with the advent of activities of the organization, referred to in the Motion for Preliminary Injunction, crew chiefs complained about the trouble being caused by what your Affiant later learned were representatives of UMOI coming into the camps and about the fact that the migrants would refuse to work in the first part of the month when food stamps were being issued and threats were made on your Affiant's life and your Affiant was hung in effigy at a party sponsored by one of these organizations and 2 of your Affiant's barns, 1 garage and 1 house for migrants were burned down to the ground. Your Affiant was in fear of his own life as well as that of his wife and children as a result of the activities of these various groups. Your Affiant was further concerned that there would be extreme violence between crew chiefs and migrants and representatives of these organizations if he allowed them to continue to enter the camps. That due entirely to these circumstances your Affiant did undertake to prevent access to the camps by representatives of these various organizations which then simply resulted in further harassment and threats and has apparently precipitated the instant litigation. Because there continues to be a threat of violence in this area during the growing season and because your Affiant does not wish to become involved in further litigation or undertake the responsibility for the maintenance of order under these circumstances, your Affiant and his wife have leased their farms to Berrybrook Farms Inc., which corporation, in turn, has executed leases of the camps to the crew chiefs who under the terms of the lease have complete authority and control of the camps and the surrounding premises and your Affiant does not intend for the year 1971 to exercise any possessory rights, authority or control over any of his camps except to the extent necessary to insure the camps complying and meeting standards of health as required by government agencies. Your Affiant further states that in his opinion if the representatives of these various organizations are allowed to enter any and all migrant camps though uninvited, there will inevitably ensue violence between crew chiefs, migrant workers and representatives of these organizations and growers will cease entirely any growing operations requiring utilization of migrant labor, all to the detriment of the migrant workers and the public which these programs ostensibly are designed to assist.

/s/ Joseph Hassle

(Notary's jurat)

Exhibit to Joseph Hassle Counter-Affidavit

VAN BUREN COUNTY HEALTH DEPT.
226 E. Michigan Avenue
Paw Paw, Michigan 49079

March 15, 1971

Senator Robert P. Griffin
Senate Office Building
Washington, D.C. 20000

Dear Senator Griffin:

I am enclosing a clipping from the South Haven Tribune which refers to a civil suit against the Hassle Farm in Van Buren County.

I would like the record to show that Mr. Hassle has never refused any employees of the Van Buren County Health Department or the Michigan State Health Department entrance to his property in the performance of their duties. I feel that the news release issued with a Washington dateline and with Attorney General Mitchell's knowledge and approval tends to be very misleading.

Mr. Hassle has always been quite fair and cooperative in dealing with this department and the state office. This relationship exists between this grower and these departments because the department representatives at all times consider the growers' rights.

This situation is an excellent example of the lack of tact and consideration exhibited by a few agencies whose representatives are not familiar with the total problem of local grower-worker relations.

Situations such as this tend to further alienate groups which have sincerely attempted to work out their mutual difficulties during the past twenty years.

Very truly yours,

Leslie C. Brown,
Acting Director

LCB/cl
Encl.